
In The
Supreme Court of the United States
October Term, 1996

JOSEPH ROGER O'DELL, III,

v.

Petitioner,

J.D. NETHERLAND, Warden,
Mecklenburg Correctional Center;
RONALD J. ANGELONE, Director, Virginia
Department of Corrections; JAMES S. GILMORE, III,
Attorney General of the Commonwealth of Virginia;
COMMONWEALTH OF VIRGINIA,

Respondents.

On Writ of Certiorari To The United States
Court of Appeals For The Fourth Circuit

JOINT APPENDIX
VOLUME II, PAGES 138-346

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JOSEPH ROGER O'DELL, III,)	
)	
Petitioner,)	Civil Action No.
v.)	3:92CV480
CHARLES E. THOMPSON, <i>et al.</i> ,)	(Filed
Respondents,)	Sep. 6, 1994)

MEMORANDUM OPINION

THIS MATTER comes before the Court on a Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and respondents' motion to dismiss and/or for summary judgment.¹ For the reasons stated herein, the petition will be GRANTED.

¹ Although the respondents filed a motion to dismiss, the Court has considered the exhibits, affidavits, transcripts and state court records. Under Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), if the district court determines that a hearing is not required, then "the judge shall make such disposition of the petition as justice shall require." Habeas Rules 8(a); *see Maynard v. Dixon*, 943 F.2d 407, 412-13 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1211 (1992). Because discovery is unnecessary in this case, the respondents' motion will be treated as a motion for summary judgment. *See Maynard*, 943 F.2d at 412-13; *see also* Fed. R. Civ. P. 12(b) ("If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . .").

I. PROCEDURAL HISTORY

On March 28, 1985, Joseph Roger O'Dell, was indicted for capital murder, abduction, rape and sodomy. O'Dell pled not guilty to all charges. His case was heard by a jury before the Circuit Court for the City of Virginia Beach, Judge H. Calvin Spain presiding.

The trial commenced with jury selection on August 11, 1986. The jury rendered its verdict of guilty on September 10, 1986. The next day the jury fixed O'Dell's sentence at death. The trial judge pronounced the sentence of death on November 13, 1986.

O'Dell is to be put to death by electrocution. No execution date has been set.

O'Dell appealed his conviction and death sentence to the Supreme Court of Virginia, which affirmed the judgment of the Circuit Court. *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988). O'Dell timely petitioned for rehearing. On April 1, 1988, the Virginia Supreme Court decided an issue on rehearing that it had erroneously held to be procedurally barred and again affirmed the conviction. *O'Dell v. Commonwealth*, Record No. 861219, slip op. (Va. April 1, 1988). The United States Supreme Court denied O'Dell certiorari to hear the appeal. *O'Dell v. Virginia*, 488 U.S. 871 (1988). O'Dell's motion for rehearing on his petition for certiorari was also denied. *O'Dell v. Virginia*, 488 U.S. 977 (1988).

O'Dell filed a Petition for a Writ of Habeas Corpus in the Circuit Court of the City of Virginia Beach on June 1, 1989. On January 31, 1990, Judge Spain dismissed the

majority of the claims raised in the First Amended Petition without an evidentiary hearing.

With leave of the court, petitioner filed a Second Amended Petition for a Writ of Habeas Corpus on July 3, 1990. the action was transferred to Judge Austin E. Owen, who dismissed the majority of the claims in the Second Amended Petition without an evidentiary hearing. Judge Owen dismissed the remainder of the Second Amended Petition on November 26, 1990, after an evidentiary hearing limited to O'Dell's competency and forensic claims.

O'Dell appealed the dismissal of his state habeas petition. The Virginia Supreme Court dismissed that appeal on April 1, 1991, because O'Dell filed a Notice of Appeal and Assignments of Error rather than a Petition for Appeal. Subsequently, the Virginia Supreme court denied a motion for reargument and petition for rehearing. The United States Supreme Court denied O'Dell's Petition for a Writ of Certiorari on December 2, 1991. Justice Blackmun, along with Justices Stevens and O'Connor, issued a statement respecting the denial of certiorari that stated: "Because I believe the evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself, I write to underscore the importance of affording petitioner meaningful federal habeas review." *O'Dell v. Thompson*, 112 S. Ct. 618 (1991).

O'Dell filed a Petition for a Writ of Habeas Corpus in this Court on July 23, 1992.

II. FACTUAL BACKGROUND

On September 10, 1986, Joseph Roger O'Dell, III, after proceeding *pro se* through a six-week trial, was convicted of murdering Helen Schartner.

The details of the crime for which O'Dell was convicted are contained in the Supreme Court of Virginia's opinion on direct review, *O'Dell v. Commonwealth*, 364 S.E.2d 491, 495-96 (Va. 1988), and are recounted briefly below.

On Tuesday, February 5, 1985, 44-year-old Helen Schartner left the County Line Lounge night club in Virginia Beach at about 11:30 p.m. O'Dell left the club sometime between 11:30 p.m. and 11:45 p.m. About two and a half hours later, O'Dell entered a convenience store with blood on his face and hands, in his hair, and on his clothes.

At about 3:00 p.m. on Feb. 6, Schartner's body was discovered in a field behind another club, across the highway from the County Line Lounge. She had been killed by manual strangulation. She also had several wounds on her head caused by blows from a handgun. These head wounds had produced extensive bleeding.

Police discovered tire tracks consistent with the tires on O'Dell's car in an area near Schartner's body.

O'Dell slept at the house of a former girlfriend, Connie Craig, for most of the day after the murder. After reading a local newspaper's account of Schartner's death, Craig found blood-stained clothing in her garage and called police. Thereafter, O'Dell was charged with murder.

Forensic evidence introduced at O'Dell's trial purportedly established that dried blood on O'Dell's shirt and jacket was the same type as Schartner's. That evidence also purported to establish the presence of semen in the victim's vagina and anus containing enzymes consistent with those in O'Dell's seminal fluid. During his incarceration, O'Dell told Steven Watson, a fellow inmate, that he had strangled Schartner after she refused to have sexual intercourse with him.

As discussed below, DNA testing of O'Dell's shirt, performed after he had completed direct appeals, revealed that the blood on that article of clothing could not have come from Schartner.

III. CLAIMS

O'Dell offers 23 claims in support of his petition that his conviction and death sentence were imposed in violation of the United States Constitution. They are as follows:

- I. Petitioner was denied his constitutional right to effective assistance of counsel.
 - Ia. He was not competent to represent himself at trial.
 - Ib. There was no constitutionally valid waiver of his right to counsel.
 - Ibi. A qualified psychiatrist was not appointed to assist him.
 - Ibii. His competency "evaluation" was constitutionally insufficient.

- Ibiii. His purported waiver of his right to counsel was not knowing.
- Ibiv. His waiver of the right was involuntary.
- Ic. Stand-by counsel failed to ensure a proper evaluation.
- Id. The trial court failed to monitor his competence to continue *pro se*.
- Ie. He was incompetent to represent himself at the penalty phase of his trial.
- If. He was denied the resources necessary to represent himself.
- Ig. Stand-by counsel was unable to render effective assistance.
- Ih. O'Dell suffered prejudice from the ineffective assistance.
- II. The government thwarted his ability to challenge the scientific evidence.
 - Ila. The Trial court erred in admitting electrophoretic evidence.
 - Ilb. The Commonwealth failed to show the reliability of the test performed by one of the Commonwealth's witnesses, Emrich.
 - Ilc. Emrich's technique in performing the scientific testing fell below the applicable standard of care.

- IId. The Commonwealth's failure to preserve evidence for retesting violated due process.
- Ile. The trial court improperly denied him an *ex parte* hearing in which to make his preliminary showing of need for funds.
- IIIf. The trial court failed to provide reciprocal discovery.
- IIg. The trial court refused to limit the Commonwealth's number of experts.
- IIh. The trial court improperly restricted his cross-examination of Dr. Sensabaugh.
- IIi. The trial court refused to limit Dr. Guth's testimony to those portions of his report dealing with serology.
- IIj. The DNA test results show the prior evidence was inaccurate.
- III. The jury was wrongfully precluded from considering mitigating evidence of petitioner's ineligibility for parole.
- IV. The petitioner was prejudiced by the admission of immaterial and irrelevant evidence of an unrelated crime.
- v. O'Dell's death sentence is unconstitutional because it was based upon aggravating factors that failed to adequately guide the sentencer's discretion.

- Va. Virginia's "vileness" aggravating factor is unconstitutionally vague as applied.
- Vb. Virginia's "future dangerousness" aggravating factor is unconstitutionally vague as applied.
- VI. The trial court failed properly to instruct the jury that it had to be unanimous as to each aggravating factor.
- VII. The trial court's penalty phase instructions were constitutionally inadequate.
- VIII. Petitioner was denied his Sixth Amendment right to confront and effectively cross-examine Steven Watson.
- IX. Petitioner's conviction and sentence were based on constitutionally insufficient and patently unreliable evidence.
- X. The Commonwealth failed to produce exculpatory evidence of a confession to the murder by David Pruett and a plea agreement with Steven Watson.
- XI. The Court failed to ensure that O'Dell's verdict and sentence would be rendered by an impartial jury unprejudiced by extraneous influences.
- XIa. A change of venue should have been granted.
- XIb. The jury should have been sequestered.
- XII. Repeated statements that the jurors' role was to "recommend" the sentence violated both Virginia and federal law.

- XIII. His constitutional right to a representative cross-section of the community in the venire was violated.
- XIV. The wrongful retention of biased jurors and the wrongful exclusion of qualified jurors violated O'Dell's rights.
- XIVa. Jurors Thurston, Foust, Villandre, and Kelly were wrongfully retained.
- XIVb. Certain venire persons were wrongfully excluded.
- XV. *Voir dire* questions to eliminate those with scruples against the death penalty were more fairly developed than questions to detect prejudice in favor of the death penalty.
- XVI. During the penalty phase, the jury was permitted to consider unreliable or irrelevant evidence.
- XVII. O'Dell's conviction was obtained through the use of perjured testimony.
- XVIII. The Commonwealth failed to establish the chain of custody of evidence introduced at trial.
- XIX. O'Dell was denied his constitutional right to effective assistance of appellate counsel.
- XX. By arbitrarily applying procedural rules to bar consideration of direct appeal of constitutional infirmities in O'Dell's trial, the Supreme Court of Virginia evaded its fundamental obligation to ensure the death penalty was not unconstitutionally applied in this case.

- XXI. The Virginia courts unconstitutionally denied O'Dell a full and fair adjudication of his state habeas corpus petition in violation of the Fourteenth Amendment.
- XXII. Electrocution is cruel and unusual punishment.
- XXIII. O'Dell's death sentence may not be carried out because he has never been adequately evaluated as free of mental illness.

IV. EXHAUSTION and PROCEDURAL DEFAULT

Respondents state that Claim Ibiii, all of the claims under point II, III, IV, VII, VIII, IX, part of Claim X, all of claims XII, XIII, XIV, XV, part of XVI, and all of Claim XX were raised by the petition in his direct appeal to the Virginia Supreme Court. Thus, the Commonwealth concedes that petitioner has exhausted his available state remedies as to these claims and that they should be reviewed on the merits.

The remainder of petitioner's claims, argues the Commonwealth, were raised for the first time in O'Dell's state habeas corpus petition. Thereafter, O'Dell did not perfect an appeal to the Virginia Supreme Court from the adverse decision he received in the state habeas court. Consequently, respondents aver that the majority of petitioner's claims are procedurally barred. Since no appeal was perfected from the order denying petitioner's state habeas petition, and the Virginia Supreme Court dismissed the appeal on procedural default grounds, the Commonwealth contends that those claims raised for the

first time in state habeas are barred from federal collateral review. See *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991); *Teague v. Lane*, 489 U.S. 288 (1989). The claims allegedly barred are: Ia, Ibi, Ibii, Ibiv, Ic, Id, Ie, Ig, V, VI, X (with respect to the claim of failure to disclose a statement of David Pruett), XI, XVII, XVIII, XX, XXII and XXIII. Furthermore, respondents aver that several of these claims are additionally barred because the habeas court expressly found that they had been ripe for presentation on direct appeal. (See Pet. App. I, Exhs, 4-5.) Under Virginia law, trial errors which can be but are not raised on direct appeal may not be raised in habeas corpus proceedings. *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975). Such claims are also barred on federal habeas. See *Wainwright v. Sykes*, 433 U.S. 72 (1977). Those claims additionally barred under *Slayton v. Parrigan* and *Wainwright v. Sykes* are: Id, IIh,² IV, V, VI, X, XI, XVIII and XXII.

In response to respondents' claim that some of petitioner's grounds for relief are procedurally barred, O'Dell argues that the Virginia Supreme Court's refusal to review the denial of habeas relief is not an adequate and independent state ground sufficient to bar this Court from reviewing O'Dell's claims because (1) under its own precedent, the Virginia Supreme Court necessarily considered O'Dell's federal claims; (2) the ambiguity of Virginia's rules for appeals in capital habeas cases, and the Virginia Supreme Court's application of these rules, precludes their operation as a bar to O'Dell's claims; and (3)

² This claim and Claim IV were not considered on direct appeal because contemporaneous objections were not made at trial under Virginia Supreme Court Rule 5:25.

this Court must exercise jurisdiction to prevent a fundamental miscarriage of justice.

After receiving an adverse decision on his state habeas petition in the Circuit Court of the City of Virginia Beach, O'Dell filed a Notice of Appeal. Thereafter, within the prescribed time, petitioner filed "Assignments of Error" in the Virginia Supreme court. However, as later determined by the Virginia Supreme Court, O'Dell should have filed a "Petition for Appeal." O'Dell did not become aware of this potential problem until after the time for filing such petition had expired.³

³ O'Dell's counsel states in an affidavit appended to petitioner's Memorandum in Opposition that an assistant state attorney general and the deputy chief clerk of the Virginia Supreme Court notified him on March 6, 1991, that, in their view, the "Assignments of Error" document was in an improper format because state law required a "Petition for Appeal." O'Dell's counsel stated that the state assistant attorney general:

told me during our telephone conversation on March 6, 1991 that he had no objection to such supplementation and would not oppose an application to have this Court approve such supplementation. . . . Mr. O'Dell moved [the Virginia Supreme Court] on March 8, 1991 for an Order allowing him to use the filings of the "Assignments of Errors" and the "Petition for Appeal" to perfect his appeal. The office of the Attorney General subsequently repudiated the assurance given to me by Assistant Attorney General [Eugene] Murphy and presented to [the Virginia Supreme court] its opposition to Mr. O'Dell's application. The Attorney General does not deny, however, that Assistant Attorney General Murphy gave me the assurances described above.

(Affidavit of Steven Fasman, ¶¶ 12-13.)

O'Dell then filed a motion in the Virginia Supreme Court in an attempt to perfect his appeal. The court dismissed his motion.

O'Dell's [sic] argues that the Virginia Supreme Court actually considered his federal claims before dismissing his habeas appeal. In a one-page order dated April 1, 1991, the Virginia Supreme Court stated that O'Dell had filed "a motion for an order allowing him to perfect his appeal in this case, and a memorandum in support of that motion." (Pet. App. I, Exh. 7, at 1.) The court denied that motion, and then issued a second order the same day rejecting the petition for appeal because "the appeal was not perfected in the manner provided by law . . ." (*Id.* at 2.)

There is no adequate and independent state ground when a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman*, 111 S. Ct. at 2557 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). The language of the Virginia Supreme Court's decision did not fairly appear to rest primarily on federal law or to be interwoven with federal law. The court expressly relied on O'Dell's failure to perfect his appeal in dismissing the case. *See id.* Therefore, the Virginia Supreme Court's dismissal of O'Dell's appeal of the state habeas court decision rested on an adequate and independent state procedural ground. *See Coleman*, 111 S. Ct. at 2556-57; *cf. Nickerson v. Lee*, 971 F.2d 1125, 1128-29 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993) (distinguishing *Coleman* when meaning of state

court decision could not be determined in combination with the pleadings).

O'Dell's [sic] next contends that the ambiguity of Virginia's procedural rules for effectuating appeals in capital habeas cases precludes their operation as a bar to his claims. The petitioner contends that the confusion, among all parties, as to the correct form of the appeal from the denial of habeas relief, demonstrates that the Virginia rules failed to give appropriate notice to litigants. Moreover, O'Dell argues that the words of the statute – "appeals lie directly to the Supreme Court" – suggest an appeal as of right, rather than a discretionary petition for appeal. Va. Code § 17-116.05:1. Thus, O'Dell contends that the dismissal is rendered ineffective as an adequate state procedural bar. *See James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (only firmly established and regularly followed state procedural rules interpose a bar to the adjudication of federal constitutional claims); *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850 (1991).

Although this argument was rejected by the Virginia Supreme Court, this Court has come to the opposite conclusion. The ambiguity of the Virginia procedural rules on appeals of state habeas decisions is aptly illustrated by the language of the relevant statutes. First, Virginia Code section 17-110.1 states: "A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court." Va. Code § 17-110.1(A). Subsection B of that provision directs that the circuit court proceedings be transcribed expeditiously and forwarded to the Supreme Court within 10 days after it is filed. Va. Code

§ 17-110.1(B).⁴ Thus, O'Dell's counsel reasonably concluded that Va. Code § 17-110.1 provided for mandatory review of all death sentences.

Next, Va. Code § 17-116.05:1 states:

In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed, from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, from any final finding, decision, order or judgment of the State Corporation commission, and from proceedings under §§ 54.1-3935 and 54.1-3937.

Va. Code § 17-116.05:1.⁵ This statute indicates that the same procedural rules that apply to appeals of convictions in death penalty cases also apply to appeals from decisions of circuit courts involving habeas corpus petitions.

Virginia Supreme Court rule 5:17(a) requires that a "petition for appeal" be filed with the clerk "in every case in which the appellate jurisdiction of [the Virginia Supreme Court] is invoked . . ." within three months after entry of the trial court order. Va. Sup. Ct. Rule 5:17(a)(1). However, Virginia Supreme Court Rule 5:22

⁴ The transcripts were filed as required by Rule 5:11. (*See Fasman Aff.* at ¶ 7.)

⁵ The portion of this statute relating to habeas petitions was added in 1985. Prior to that amendment, appeals from the state habeas court went to the state court of appeals as of right. *See Titcomb v. Wyant*, 323 S.E.2d 800 (Va. 1984).

The types of appeals referenced in Va. Code § 17-116.05:1(B) other than habeas appeals were also appeals of right.

purports to make a special rule applicable to cases in which death sentences are imposed. It states:

(a) Upon receipt of a record pursuant to § 17.110.1 B, the clerk of this Court shall notify in writing counsel for the accused in the circuit court (who shall be deemed to be counsel for the appellant), the Attorney General (who shall be deemed to be counsel for the appellee), and the Director of the Department of Corrections of the date of its receipt (the Filing Date). The case shall thereupon stand matured as if an appeal had been awarded to review the conviction and the sentence of death, and the notice issued by the clerk, of this Court shall be deemed to be the certificate of the clerk of this Court pursuant to Rule 5:23 that an appeal has been awarded, and the enforcement of the sentence of death shall thereby be stayed pending the final determination of the case by this Court.

(b) Within 10 days after the Filing Date, counsel for the appellant shall file with the clerk of this Court assignments of error upon which he intends to rely for reversal of the conviction or review of the sentence of death. He shall accompany the assignments of error with a designation of the parts of the record relevant to the review and to the assignments of error. Not more than 10 days after such assignments of error and designation are filed, counsel for the appellee may file with the clerk of this Court a designation of the additional parts of the record that he wishes included as germane to the review or to any assignments of error. Counsel for the appellant shall include in the appendix the parts so designated. . . .

(c) With respect to the sentence of death, it shall be a sufficient assignment of error to state that the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor or that the sentence is excessive or disproportionate to the penalty imposed in similar cases.

(d) Except to the extent that a conflict with this Rule may arise (and this Rule shall then be controlling) further proceedings in this case shall conform to the Rules relating to cases in which an appeal has been perfected.

(e) This Court may, on motion in a particular case, vary the procedure prescribed by this Rule in order to attain the ends of justice and the purpose of § 17-110.1.

Va. Sup. Ct. Rule 5:22.

These rules are ambiguous on the procedure for appeals from the denial of state habeas decisions. Virginia Supreme Court Rule 5:22 refers to Virginia Code section 17.110.1(B), which makes no clear distinction between direct appeals and habeas appeals. In light of the circumstances existing at the time, O'Dell's counsel reasonably concluded that the broadly worded exception for capital cases in Rule 5:22 also applied to appeals from the denial of post-conviction relief. State law did not give fair notice that the "petitions for appeal" referenced in Rule 5:17 were required for state habeas appeals rather than the "assignments of error" allowed in Rule 5:22. Once a state has provided for an appeal, the procedures governing

those appeals and the state's application of those procedures in individual cases must comply with due process. In O'Dell's case,⁶ the requirement of filing a "petition for appeal" in lieu of "assignments of error" was not "firmly established and regularly followed." See *James*, 466 U.S. at 348-49 (Kentucky's distinction between "admonitions" to the jury and "instructions" to the jury not firmly established and regularly followed).

"Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.* at 349 (quoting Justice Holmes in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923)); see also *Ford*, 111 S. Ct. at 857 (state procedural rules must be timely established and give fair notice to litigants). Therefore, the claims O'Dell raised for the first time in the state habeas court are not barred by the reasoning in *Coleman*,⁷ because the

⁶ More than three years have passed since the dismissal of O'Dell's state habeas appeal. The Court obviously makes no determination here whether the requirement of filing "petitions" for appeal from the denial of state habeas review has become firmly established and regularly followed since the disposition of O'Dell's appeal in 1991.

⁷ *Coleman* is factually inapposite to O'Dell's petition. In *Coleman*, the Court rejected the petitioner's contention that *Ake* applied to the Virginia Supreme Court's dismissal of his appeal for failure to file a timely notice of appeal. Its rationale does not apply here. In this case a timely notice was filed, along with the identification of assignments of error. Whereas *Coleman* "[did] not contend that the failure of the Virginia Supreme Court to hear his untimely state habeas appeal violated one of his constitutional rights," *Coleman*, 111 S. Ct. at 2560-61, O'Dell

state procedural rule requiring petitions for appeal to be filed instead of assignments of error cannot constitute an "adequate and independent state ground" for the state court's ruling. See *James*, 466 U.S. at 348-49; *Ford*, 111 S. Ct. at 857; see also *O'Dell v. Thompson*, 112 S. Ct. 618, 619-20 (1991) (Statement of Justices Blackmun, Stevens and O'Connor).

Having concluded that *Coleman* should not bar the consideration of claims Ia, Ibi, Ibii, Ibiv, Ic, Id, Ie, Ig, V, VI, X (with respect to the claim of failure to disclose a statement of David Pruett), XI, XVII, XVIII, XX, XXII and XXIII of O'Dell's federal habeas petition, the next question is whether any of his remaining arguments are sufficiently meritorious to excuse the procedural default of claims Id, Iih, IV, V, VI, X, XI, XVIII and XXII under *Wainwright v. Sykes*, which prevents federal court consideration of claims which could have been raised an earlier stage of the process but were not.

In conjunction with O'Dell's argument that the Virginia Supreme Court's refusal to review the denial of habeas relief is not an adequate and independent state ground, O'Dell asserts that this Court must exercise jurisdiction over all claims raised in his federal habeas petition to prevent a fundamental miscarriage of justice. See *McCleskey v. Zant*, 499 U.S. 467, ___, 111 S. Ct. 1454, 1474 (1991). O'Dell contends that his petition raises substantial claims of innocence, and, therefore, a hearing on the

makes exactly that argument. Moreover, unlike the notice of appeal, a petition for appeal is not a "purely ministerial document." *Id.* at 2561.

merits is necessary to evaluate these claims. The discussion of O'Dell's actual innocence claim will appear in Part V.

Petitioner's second argument in response to the Commonwealth's assertion that some claims are procedurally barred under *Wainwright v. Sykes*, 433 U.S. 72 (1977), is that this Court may hear claims that were not presented on direct appeal. O'Dell states that even in a proper case of procedural default, federal review is mandated if there is cause for the default and prejudice thereby. See *Murray v. Carrier*, 477 U.S. 478 (1986). Petitioner further avers that cause includes "a showing that the factual or legal basis for a claim was not reasonably available to counsel [or] that the procedural default was the result of constitutionally ineffective assistance of counsel." *Whitley v. Bair*, 802 F.2d 1487, 1504 (4th Cir. 1986) (citing *Murray v. Carrier*, 477 U.S. 478 (1986)), cert. denied, 480 U.S. 951 (1987).

O'Dell argues that he has asserted numerous bases for his ineffective assistance of appellate counsel claim (i.e. appellate counsel's (1) failure to investigate adequately a possible *Brady* violation; (2) failure to renew a chain of custody argument concerning clothing introduced as evidence against O'Dell, which was first raised in O'Dell's motion to overturn the verdict; (3) inability to recognize other issues raised in the federal habeas corpus petition). Furthermore, O'Dell argues that constitutional standards of ineffective assistance of counsel cannot be meaningfully applied without a hearing.

Petitioner contends that any failure to present on appeal the other claims for relief which the Commonwealth asserts are barred by *Sykes* stems directly from

this ineffective assistance of appellate counsel. Thus, O'Dell argues that he has asserted cause for any purported procedural default under *Sykes*. See *Orazio v. Dugger*, 876 F.2d 1508, 1511 (11th Cir. 1989) (counsel's failure to raise claim on direct appeal constitutes ineffective assistance and cause for procedural default).

O'Dell also avers that he has sufficiently alleged prejudice resulting from appellate counsel's ineffective assistance. The Petition contends that appellate counsel failed to comply with Virginia procedural rules, and that other claims were ineffectively briefed. (See Pet. ¶¶ 362-63.)

In response to O'Dell's argument that he has demonstrated cause and prejudice, the Commonwealth asserts that, having failed to raise the issue of ineffective assistance of counsel on appeal in the state courts from the denial of habeas relief, O'Dell has procedurally defaulted, barring consideration of such claim as being cause under *Wainwright v. Sykes*. See *Justus v. Murray*, 897 F.2d 709, 711-714 (4th Cir. 1990).

In *Justus v. Murray*, the Fourth Circuit stated that *Murray v. Carrier*, 477 U.S. 478 (1986), stands for the proposition that "before an ineffective assistance of counsel claim may be raised as cause in federal habeas, it must first be exhausted in state court and not be procedurally defaulted." *Justus*, 897 F.2d at 714. In this case, O'Dell raised his claim of ineffective assistance of counsel in his state habeas corpus petition, and his failure to perfect an appeal to the Virginia Supreme Court cannot constitute a procedural default if those rules were not "firmly established and regularly followed" under *James*. Thus, *Justus* should be distinguished from this case.

However, the inquiry does not end there. "[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). The only prejudice alleged by O'Dell is that his appellate counsel inadequately briefed some claims, and failed to comply with Virginia procedural rules. (Pet. ¶ 362-63.) O'Dell has not identified what claims the Virginia Supreme Court refused to consider because of his counsel's failure to comply with procedural rules. In addition, he has not identified what claims were "inadequately briefed," nor what could be added to make the briefing adequate. These boilerplate allegations of prejudice are insufficient to warrant a hearing on the claims barred by *Slayton* and *Sykes*. Accordingly, claims Id, IIh, IV, V, VI, X, XI, XVIII and XXII will not be considered on the merits.

V. ACTUAL INNOCENCE and PROCEDURAL DEFAULT

Under current law, actual innocence is not a separate constitutional claim. Instead, it is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 113 S. Ct. 853, 862 (1993). Under the authority of *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), the petitioner argues that any procedural bar should not apply to his case because deoxyribonucleic

acid (DNA) tests show that he is innocent.⁸

⁸ The second question before this Court is whether O'Dell's factual innocence claim has merit.

The state habeas judge ruled this way:

The court is of the opinion that the serological evidence produced at trial was not flawed, that it was in accordance with recognized standards in existence at the time; and while it may be that current testing methods would have produced a different result, that . . . does not justify the issuance of a writ of habeas corpus.

(Pet. Appendix II, p. 263.)

In *Herrera v. Collins*, the Supreme Court discussed the possibility that such a claim would be recognized, but only in rare circumstances would it succeed. The Court stated:

We may assume, for sake of argument in decided this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often state evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 869.

Although the Court did not explain what it meant by "extraordinarily high" or "truly persuasive demonstration," by implication such standards would involve proof beyond the clear and convincing standard recognized in *Sawyer*. The DNA evidence introduced at O'Dell's federal evidentiary hearing did not surpass this standard, see *Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993) (articles attacking accuracy of DNA testing insufficient to meet factual innocence threshold), nor did O'Dell's evidence establish that "no

The Court held an evidentiary hearing on O'Dell's innocence claims on August 2, 1994. At this hearing, O'Dell was permitted an opportunity to show that DNA evidence developed after his trial establishes that he is innocent of the crime such that otherwise procedurally defaulted claims should be reviewed on the merits.

The Fourth Circuit has adopted the *Sawyer v. Whitley* test for considering actual innocence claims.⁹ See *Spencer v. Murray*, 18 F.3d at 236. Under *Sawyer*, to have a defaulted claim reviewed, a petitioner must prove "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the

rational trier of fact could [find] proof of guilt beyond a reasonable doubt," See *Herrera*, 113 S. Ct. at 875 (White, J., concurring) (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)).

⁹ This Court cited *Sawyer v. Whitley*, 505 U.S. ___, 112 S. Ct. 2514 (1992), in the Order scheduling the hearing. Thereafter, the petitioner filed a Pre-Hearing Memorandum which stated:

Although the Court's Order of July 5, 1994 cited *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992) as supplying the standard for determining the "actual innocence" claim of this case, in that case the petitioner did not challenge his guilt of the underlying crime, but asserted that he was "innocent of the death penalty." Here, in contrast to *Sawyer*, Petitioner asserts a claim of actual innocence of the crime itself. Accordingly, Petitioner submits that the standard set forth in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), governs this case.

(Pre-Hearing Mem. at 5.)

The Fourth Circuit has rejected this argument, holding that the *Sawyer* standard also applies to guilt-phase errors. *Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir. 1994).

petitioner eligible for the death penalty under the applicable state law." *Spencer*, 18 F.3d at 236 (citing *Sawyer*, 112 S. Ct. at 2515).

The alleged constitutional error in this case is that the petitioner's conviction was based on constitutionally unreliable electrophoretic enzyme test results of blood-stained clothing recovered from Connie Craig's house. As explained in Part VIII of this Opinion, O'Dell has failed to demonstrate that the evidence was constitutionally unreliable. Moreover, this allegation is similar to the innocence claim attempted – and rejected – by the Fourth Circuit in *Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993).

In that *Spencer* opinion, the petitioner argued that "because of the alleged errors in the testing process his DNA results were flawed and he is 'actually innocent.'" *Id.* at 765. The court of appeals determined this argument "boils down to an assertion that the DNA results were flawed and [Spencer] was wrongly convicted. This is a claim of factual innocence. The errors he points to – potential errors in the results of the DNA test – are errors of fact, not law." *Id.* at 765.

Although the *Spencer* decision presents a sufficient legal basis to refuse to consider O'Dell's claim of "actual" innocence, the Court will, nevertheless, discuss the fair probability that the electrophoretic test results of blood-stains used against O'Dell were erroneous.¹⁰ The reason for this discussion is that the Statement of three Justices

¹⁰ As explained below, the Court expressly holds that O'Dell's evidence fails the controlling *Herrera* standard, but would meet a "fair probability" standard. Cf. *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n.17 (1986), with *Sawyer v. Whitley*, 112 S. Ct. at 2515 and *Spencer v. Murray*, 18 F.3d at 236.

of the United States Supreme Court indicates that that Court envisioned a complete inquiry into the merit of O'Dell's DNA evidence.

Even if practical considerations did not preclude review on the merits of all such petitions, another consideration often argues against granting certiorari: in many of these cases, a federal habeas proceeding is necessary to develop further the petitioner's claims, both factually and legally. This is one such case. Because I believe the evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself, I write to underscore the importance of affording petitioner meaningful federal habeas review.

O'Dell v. Thompson, 112 S. Ct. 618 (1991) (Statement of Justice Blackmun, Stevens and O'Connor respecting the denial of certiorari). In light of the concerns expressed by this Statement, the Court will discuss the evidence introduced on August 2, 1994, at the federal evidentiary hearing on O'Dell's innocence claims.

A. O'Dell's Experts¹¹

Dr. John Edward Spence is a medical geneticist for the Clinical Genetics Laboratory at Carolinas Medical Center in Charlotte, North Carolina. The respondents stipulated to his qualifications in the general area of DNA

¹¹ O'Dell's case in chief consisted solely of the transcribed testimony of three experts, Dr. John Edward Spence, Dr. Scott Diehl, and Dr. Richard A. Guerrieri, who testified at the evidentiary hearing ordered by the state habeas court.

testing. (Hab. Tr. 74.)¹² Dr. Spence described the type of DNA testing performed on bloodstains from the shirt and jacket found by Connie Craig after the murder. The technique is referred to generally as restriction fragment length polymorphism (RFLP), or, more specifically, as Southern Blot Analysis.¹³

¹² By the time of the federal evidentiary hearing, Dr. Spence had testified 14 to 15 times in the area of DNA testing, all but two of which were on behalf of the prosecution.

¹³ This technique, which was performed by LifeCodes Corporation, involves:

1. Breaking open the cell with reagents to isolate the nuclei. Enzymes digest proteins around the DNA to isolate it into a liquid solution.
2. A restriction enzyme is applied to cut the DNA into small pieces.
3. The DNA fragments are loaded onto a gel made of agarose. An electrical field is applied across the gel to make the DNA, which has a negative charge, move to the positive charge. This is called electrophoresis. The smaller fragments travel farther in the gel, which causes the fragments to line up in an array.
4. The DNA is denatured from double to single strands.
5. Salt solutions transfer the DNA to a membrane made of nylon, which overlays the gel.
6. A DNA probe (a piece of DNA previously isolated with known characteristics) is introduced. It is single stranded and has a radioactive "label" allowing it to be tracked.
7. DNA on the membrane is put into a hybridization solution with the probe. The probe will attach only where it matches.
8. All excess reductivity is washed off, along with all incomplete matches. The filtering membrane with the probe attached is then laid against a piece of X-ray film.
9. The probe, being radioactive, will cause an exposure on the X-ray film (an "autoradiograph"). "Bands" or "hybridization points" will show up on the X-ray where the probe is attached.

From an examination of the autoradiographs ("autorads") produced by LifeCodes Corporation, Dr. Spence concluded that the DNA from the bloodstained shirt and DNA from the victim could be "excluded" as having a common origin. (App. II at 83.) Dr. Spence then examined DNA test results from the victim and the bloodstained jacket. He testified that the bands on the jacket sample are "consistently higher than the bands on the victim sample . . . they are not exactly the same position compared to the markers flanking them." (*Id.* at 84-85.) Based on that observation, he determined that the DNA comparison of the bloodstained jacket and the victim yielded an "inconclusive" result. (*Id.* at 87.)

On cross-examination, the Commonwealth explored the possibility that the difference in band positions on some of the autorads could be explained by a phenomenon described as "band shifts," which can occur from degradation of the sample through environmental factors or from the age of the sample. (*Id.* at 85-87.) Dr. Spence conceded that bands do not have to match positions exactly before they can be considered as having a common origin. However, he testified that "in my experience, this is more variation than is typically allowed for band positions. . . ." (*Id.* at 86.)

This allows the laboratory to determine whether a "match" has occurred.

See Appendix II, 58-72; *RFLP DNA Analysis* (LifeCodes Corporation videotape), submitted as background material by joint agreement of the parties; See generally *United States v. Young*, 754 F. Supp. 739, 740-41 (D. S.D. 1990).

Dr. Scott Diehl is an Assistant Professor of Psychiatry and Human Genetics. He was accepted as an expert in DNA electrophoretic testing, polymorphic protein testing, and population distributions. Diehl testified that he had "considerable reason to be concerned" about the reliability of polymorphic enzyme tests performed by Commonwealth expert Jacqueline Emrich, which was crucial evidence at O'Dell's trial. (App. II at 107.) Among other problems, he testified that:

1. The lab notes failed to disclose when the analysis was performed, and did not contain a signature indicating who had performed the work. (*Id.* at 108.)
2. The materials disclosed a high test failure rate. (*Id.* at 108-109.)
3. The lab notes were "incomprehensible," making it virtually impossible for outside experts to review. (*Id.* at 109-110, 117.)

Based on the enzyme tests, Emrich had concluded that blood on O'Dell's checkered shirt was "consistent with blood from Helen Schartner and different from Joseph O'Dell." (Tr. 48B:39-40.) Dr. Diehl testified that the more reliable DNA test results, which established that the victim's blood did not match the blood on the shirt, "validated" his concern about the reliability of the enzyme test results introduced at trial. (App. II at 116.)

Commonwealth expert Dr. Richard A. Guerrieri was employed by the Commonwealth of Virginia in the Tidewater Regional Crime Laboratory's Forensic Science Division. Dr. Guerrieri was an [sic] employed as a forensic serologist specializing in DNA analysis. (*Id.* at 202, 208.)

Dr. Guerrieri confirmed Dr. Spence's conclusions with regard to the DNA test results. He testified that (a) the victim could be excluded as a source of the blood on the shirt, and (b) the DNA test results of the blood on the jacket sample was "inconclusive." (*Id.* at 234.) However, because the band shift of the blood on the jacket was within the state crime laboratory's normal limit of 2.5 percent, he testified that the jacket sample could not exculpate O'Dell.

The sample on the right, which I believe was from the jacket, to my - I've seen a pattern that is similar to the victim's blood; however, I don't use this particular probe; and based on that overall pattern, I would term that inconclusive.

So I am not eliminating, nor am I including, the victim as a source on that particular stain. My interpretation is it's inconclusive, and I would refer the interested parties to Lifecodes for their interpretation.

(*Id.* at 241.)

B. Commonwealth's Expert

At the federal evidentiary hearing, Jeffrey D. Ban testified on behalf of the Commonwealth. Ban is employed by the state crime laboratory's forensic science division. He was accepted as an expert in DNA analysis.¹⁴ (Hab. Tr. at 12.) He also reviewed the autorads of

¹⁴ Ben testified that he has worked on behalf of the government for most of his career, and that he has never testified on behalf of the defense. (Hab. Tr. at 35.)

the blood samples from the shirt, jacket, victim and O'Dell produced by LifeCodes Corporation.

Ban testified that each individual laboratory sets standards for the allowable amount of band shift that many occur before a test is determined to be inconclusive (the "match criteria"). Ban stated that the state crime laboratory set its match criteria at 2.5 percent. (Hab. Tr. at 20.) LifeCodes Corporation's match criteria was 1.8 percent in 1990. (*Id.*)

Applying the state crime lab's match criteria of 2.5 percent to LifeCodes' report, Ban concluded that the DNA on the jacket sample was "consistent" with the victim's DNA. (Hab. Tr. at 30, 41.) However, the bands from the jacket sample were outside the LifeCodes match criteria of 1.8 percent. (Hab. Tr. at 43.)¹⁵

Ban acknowledged that, by applying the state crime lab's match criteria to the LifeCodes report, he did not follow the recommendations of the National Research Counsel (NRC). That organization, which is a body of the National Academy of Sciences, appointed a committee to make a report on DNA technology in forensic science. The committee's report, which was issued in 1992, recommends that each lab determine its own match criteria. (Hab. Tr. at 50.) Ban explained his analysis of LifeCodes' report in this manner: "[I]n the NRC report, it refers to if a sample falls outside of match criteria, you should not

¹⁵ Ban testified on recross-examination that when probes fall inside the match window and others fall outside the match window, the proper procedure is to declare the results "inconclusive." (Hab. Tr. 69.) He did not explain why he labeled this results "consistent" in his earlier testimony.

classify it as a match; you should classify it as inconclusive. This has not fallen outside of my criteria, so I have not classified it as inconclusive." (*Id.*)

This testimony prompted the following dialogue with the Court:

Q. Now, another lab, going through similar experimentation, could possibly come up with a different match criteria because it is a different lab, different personnel, different conditions.

BAN: That's correct.

Q: All right. Now, it would be fair to say that each lab who ran these experiments and came up with a match criteria, one lab's match criteria is as valid as another lab's match criteria; is that correct?

BAN: Yes, that's correct.

(Hab. Tr. at 71.)

Ban also testified that LifeCodes attempted to use a monomorphic probe to correct for band shifting in the jacket sample. Although using a monomorphic probe to detect band-shifting is an accepted technique among DNA experts, the NRC report recommends against using monomorphic probes to correct for band shifting:

Little has been published on the nature of band shifting, on the number of monomorphic internal control bands needed for reliable correction, and on the accuracy and reproducibility of measurements made with such correction. For the present, several laboratories have decided against attempting quantitative corrections; samples that lie outside the match criterion because of apparent band shifting are declared

to be "inconclusive." The committee urges further study of the problems associated with band shifting. Until testing laboratories have published adequate studies on the accuracy and reliability of such corrections, we recommend that they adopt the policy of declaring samples that show apparent band shifting to be "inconclusive."

Committee on DNA Technology in Forensic Science, National Research Council, *DNA Technology in Forensic Science* 61 (1992). LifeCodes' report stated that although the bands in one of the jacket samples fell outside its match criteria of 1.8 percent, the laboratory nevertheless corrected for band shifting, apparently by using a monomorphic probe. (*See* Hab. Tr. at 108.)

C. O'Dell's Expert Testimony in Rebuttal

On rebuttal at the federal evidentiary hearing, O'Dell again offered Dr. Spence as an expert. Dr. Spence testified that the state crime lab should not have substituted its match criteria of 2.5 percent in place of LifeCodes' match criteria of 1.8 percent. In response to questioning from the Court, Dr. Spence testified that substituting match criteria is an illegitimate method of analyzing autorads:

The laboratory sets up their standards. They have certain people there doing that testing. They are using certain systems, certain enzyme systems, agents, biological reagents that are specific to that laboratory. The overall protocols are very similar. The general principles are the same. The specifics of how they are applied, the specific reagents they use, the equipment they

use, their electrophoresis procedure, hybridization procedure all needs to be specific to that laboratory. There are some little subtle differences that can occur. I think if one laboratory sets up their criteria, the results of that laboratory should be analyzed through that criteria and not taken by other criteria . . .

(Hab. Tr. at 75.)

Dr. Spence agreed with the NRC report that using monomorphic probes is not a scientifically reliable method of correcting for band shifting. (Hab. Tr. at 88-89.)

D. Conclusions

Based on the evidence at the evidentiary hearing, the blood on the jacket and the blood on the checkered shirt can be excluded as having a common origin. Again, based on the evidence, the DNA comparison of the blood on the checkered shirt and the victim's blood yielded a result that is "inconclusive."

In addition, while the use of monomorphic probes to correct for band shifting is controversial, *see People v. Keene*, 591 N.Y.S.2d 733 (N.Y. Sup. Ct. 1992), O'Dell has established that the Commonwealth's expert should not have substituted LifeCodes' match criteria of 1.8 percent with the state crime lab's match criteria of 2.5 percent.

Despite this testimony, O'Dell has not proven factual innocence.¹⁶ Based on the circumstantial evidence introduced at trial, and on the confession O'Dell made to jail

¹⁶ Nor has O'Dell proved that the trial court's acceptance of Emrich's testimony violated his right to fundamental fairness.

house informant Steven Watson,¹⁷ has not proved beyond clear and convincing evidence that he is factually innocent of the crime of murdering Helen Schartner.¹⁸ *See Herrera*, 113 S. Ct. at 869 (setting an "extraordinarily high" threshold and requiring a "truly persuasive demonstration").

VI. FEDERAL COLLATERAL REVIEW

The Commonwealth avers that petitioner is seeking federal collateral review of a presumptively valid state court judgment – a judgment that has withstood both direct and collateral review – and is merely asking this Court to reach different legal conclusions from those reached by the state courts based upon the same factual

(*See, supra*, Part VII.) Thus, there was no predicate constitutional violation to justify applying the *Sawyer* actual innocence standard. *See Spencer v. Murray*, 5 F.3d at 765.

¹⁷ As stated later in this Opinion, the Virginia Supreme Court's finding that no plea agreement existed between Watson and the Commonwealth must be presumed correct, and O'Dell's new evidence does not indicate that he could rebut this finding by convincing evidence. (*See, supra*, Part XII, Claim X.)

¹⁸ O'Dell also failed to establish that "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt." *See Herrera*, 113 S. Ct. at 875 (White, J., concurring) (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)).

Although O'Dell evidence did establish a "fair probability" that, in light of all probative evidence available at the time of his federal evidentiary hearing, "the trier of the facts would have entertained a reasonable doubt of his guilt," *see Kuhlmann v. Wilson*, 477 U.S. at 454 n.17, this does not entitle him to federal habeas relief on his factual innocence claim, *see Herrera*, 113 S. Ct. at 869; *Spencer*, 5 F.3d at 765.

record. Thus, for this reason, respondents contend that all of O'Dell's claims are barred under the "reasonableness" standard of review articulated by the Supreme Court. See *Wright v. West*, 112 S. Ct. 2482, 2490 n.8 (1992) (Opinion of Thomas, J.) (federal habeas relief is barred "whenever the state courts have interpreted old precedents reasonably, not only when they have done so 'properly' "); *Butler v. McKellar*, 494 U.S. 407, 110 S. Ct. 1212 (1990). Respondents assert that a federal habeas court must "validate reasonable, good-faith interpretations of existing precedents made by state courts," and a state court decision is "reasonable" unless acceptance of the prisoner's claim was "compelled" or "dictated" by existing precedent. *Butler*, 110 S. Ct. at 1217. The Commonwealth contends that none of the claims raised in O'Dell's federal habeas petition were dictated by precedent, nor are they compelled by current law.

The petitioner disputes the Commonwealth's reading of *Wright v. West*. O'Dell asserts that *Wright* does not establish a new, deferential standard of review of state court decisions. O'Dell states that the Commonwealth's reliance on the plurality opinion is misplaced, in that at least four justices rejected Justice Thomas' analysis of *Teague*, while the remaining two justices did not reach the question. Thus, O'Dell contends that this proposed standard does not command the force of law and cannot bind this Court. O'Dell maintains that *Teague* is the applicable standard.

Respondents counter that while a majority of the Court in *Wright* did not endorse the "reasonableness" standard of review, at the same time it refused to endorse its previous adherence to a standard of *de novo* habeas

review with respect to issues involving mixed constitutional questions. Therefore, the Commonwealth argues that, at the very least, *Wright* erodes the notion that *de novo* standard of review is applicable to cases involving mixed questions of law and fact.

Both sides have valid arguments with respect to the Supreme Court's holding in *Wright*. However, because the Supreme Court was unable to agree on a new standard, the Fourth Circuit's decision on this issue is binding. In *Wright*, the Fourth Circuit relied on *Jackson v. Virginia*, 443 U.S. 307 (1979), which required the federal habeas court to review the petitioner's claims *de novo*. See *Wright v. West*, 931 F.2d 262, (4th Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2482 (1992); see also *Hawkins v. Murray*, 798 F. Supp. 330, 334 n.10 (E.D. Va. 1992) (Fourth Circuit rule remains *de novo* review). Therefore, this Court must review petitioner's federal claims *de novo*.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The first ground for relief asserted in the petition is that O'Dell was denied his Sixth Amendment right to the effective assistance of counsel. In support of his claim, O'Dell argues that he was not competent to represent himself at trial, that the trial court failed to appoint a qualified psychiatrist to evaluate him, and that the competency evaluation was constitutionally insufficient. (Hab. Pet. Ia, Ibi, Ibii.) In addition, he claims that his purported waiver of his right to counsel was not knowing and voluntary. (Hab. Pet. Ibiii, Ibiv.)

Deciding whether a defendant is competent involves factual determinations in which the findings of state courts are presumed correct. *See Adams v. Aiken*, 965 F.2d 1306, 1313 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2966 (1993). The state habeas court concluded that even if the court-appointed psychiatrist's evaluation was deficient, the record disclosed no prejudice resulting from that failure because even a proper evaluation would not have revealed that the defendant was incompetent to waive counsel. Secondly, Judge Owen ruled that the Supreme Court cases do not require a competency evaluation by the trial court before that court determines the defendant has made a knowing and intelligent waiver. Finally, the habeas court concluded that the psychological evaluation was sufficient, and that it was only one of the many factors considered by the trial court in concluding that O'Dell competently waived his right to counsel. (Appendix vol. II at 244-45.)

In *Godinez v. Moran*, 113 S. Ct. 2680 (1993), the Supreme Court held that the standard for determining whether a defendant is competent to stand trial is the same standard for deciding whether the defendant is competent to waive his right to counsel. Once a trial judge determines that a defendant is competent to stand trial, the judge must then determine that the defendant's waiver is "knowing and voluntary." *Id.* at 2687. The Court cautioned that "as in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence." *Id.* at 2688 n.13.

In an Order issued October 24, 1985, (Appeal vol. I, No. 74), the trial court appointed a psychiatrist, Dr. Stanley J. Kreider, to evaluate O'Dell's competency. The evaluation occurred on October 29, 1985. Dr. Kreider stated that he evaluated O'Dell "specifically with regard to his mental state at the time of the commission of the alleged offenses, and to determine his competency to understand the nature of the proceedings against him and to assist counsel in preparation of his defense." (App. I, Exh. 12.) The doctor determined:

There was no evidence of any psychiatric illness either at the time of the alleged offenses or at the present time. In addition the patient is considered competent to understand the charges against him, to assist counsel in the preparation of his defense, and to make a voluntary and intelligent decision to waive his right to counsel and prepare his own defense.

(*Id.*)

O'Dell argues that Dr. Kreider, the court-appointed psychiatrist, was unqualified to determine if O'Dell was competent to represent himself because he had no formal training in forensic psychiatry and had never conducted an evaluation to determine whether a defendant was competent to waive counsel. O'Dell further argues that Dr. Kreider was unfamiliar with the relevant state evaluation statutes, and was not qualified under Virginia law to conduct forensic evaluations in criminal cases. *See Va. Code Ann. §§ 19.2-169.1(a), -169.5(a)* (1990 Rep. Vol.).

The Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985), held that a criminal defendant must be provided with access to a competent psychiatrist to assist in his defense when the

defendant's mental state is at issue. *Ake* required merely a competent psychiatrist to conduct "an appropriate examination," but did not specifically require a forensic psychiatrist. Although Dr. Krieder's admitted lack of training in forensic psychiatry might have undermined his credibility with respect to O'Dell's competency, the psychiatrist was familiar with the legal standard for determining when a defendant is competent to stand trial. (See App. II at 125-127, 166-67.)

O'Dell's direct examination of Dr. Krieder at the state habeas hearing attempted to show that the psychiatrist was unfamiliar with the legal standard for competency to waive counsel. However, the Supreme Court's holding in *Godinez* renders O'Dell's attempt futile. The standard for competency to stand trial is the same as the standard to waive counsel. See *Godinez*, 113 S. Ct. at 2687. Because Dr. Kreider was familiar with the former, he was – by definition – familiar with the latter.

The next question concerns whether O'Dell's waiver of his right to counsel was knowing and voluntary. O'Dell's first attorney, William Burnside, left the Public Defender's Office and was replaced by Peter Legler shortly after the first preliminary hearing was held on April 29, 1985. (Tr. 1:2-6.) Legler represented O'Dell for about four months. On August 15, 1985, however, Legler moved to withdraw as counsel, citing a conflict of interest. (Tr. 1:2-7.) The court granted Legler's motion without requiring details about the conflict.

I'm assuming from the comments made by Mr. Legler that this is one of the two matters as to which he made reference yesterday without the specifics of the matters in indicating to the

Court that he thought that there existed a likelihood that his representation of the interests of one client for whom his office had been appointed might well be adverse to the interests of another client . . . as to whom his office had been appointed and asked my advice as to whether he should seek outside assistance in determining whether in fact there did exist an ethical problem . . .

* * *

He has apparently, judging by his motion, determined that in his opinion his continued representation of this client would not only adversely affect the interests of the client but would place him in a position where he might violate the canons relative to the conduct of attorneys.

* * *

It would seem to me then that any attempt to disclose the details of the possible conflicts relating to these parties could not but serve to affect adversely the interests of at least one and perhaps both of those parties as to whom he has been assigned; and under those circumstances I cannot see any necessity for requiring any further disclosure.

The Office of the Public Defender is appointed in this city to represent perhaps ninety-seven to ninety-eight percent of all those [who need court-appointed counsel], and obviously conflicts will arise from time to time.

It has been the experience of this Court that the occasions where the Public Defender has felt

it necessary to ask to be relieved from representation have been relatively rare under the circumstances, and the Court has every reason to believe then that that office is fairly exercising its discretion when it believes that there is in fact a conflict or potential conflict.

Obviously counsel should not be compelled to continue in a situation where it believes that its further participation will be a violation of the canons of ethics and obviously also the interests of the defendant would be unfairly prejudiced under such a circumstance.

(Tr. 1:6-8.)

Under *Faretta v. California*, 422 U.S. 806, 835 (1975), a waiver of a right to counsel must be "knowing and intelligent." *Id.* The *Faretta* Court stated:

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Id.

In contrast to other circuits, the Fourth Circuit "requires no particular form of interrogation." *United States v. Gallop*, 838 F.2d 105, 110 (4th Cir.), *cert. denied*, 487 U.S. 1211 (1988). However, the Fourth Circuit has stated that:

"[a]t a minimum [the trial court] should, before permitting an accused to waive his right to counsel, explain the charges and the possible

punishments. . . ." The district judges also should "develop on the record the educational background, age and general capabilities of an accused, so that the ability of an accused to grasp, understand and decide is fully known" to the trial court and fully disclosed by the record. The failure to do so however, would not automatically render the proceedings unconstitutional.

Id. (citations omitted) (quoting *Aiken v. United States*, 296 F.2d 604, 607 (4th Cir. 1961) and *Townes v. United States*, 371 F.2d 930, 934 (4th Cir. 1966), *cert. denied*, 387 U.S. 947 (1967)).

The transcript of the hearings of October 17, and December 2, 10, and 18 of 1985, demonstrates that the trial judge complied with the minimum requirements of *Gallop*. Although he did not expressly state on the record the charges and the possible punishments, it is apparent that the defendant was aware of the nature of the proceedings and understood it could result in a death sentence. He was also warned about the handicaps of being held in jail, the difficulty of examining hostile witnesses, the limited role of standby counsel and the trial judge, and the fact that a lawyer might not be re-appointed if he changed his mind. (See Tr. 4-12A.)

Because O'Dell indicated at the time his desire for Legler to remain as counsel and his willingness to waive any conflict of interest, he maintains that the trial court violated his right to waive the conflict. After the court appointed Paul Ray, a solo practitioner who had never handled a capital case, to represent him, O'Dell maintains that he believed he had no choice but to proceed *pro se*

after the trial court denied his motions for alternative counsel.

Although a criminal defendant has the right to waive his right to conflict-free counsel, *see United States v. Duklewski*, 567 F.2d 255 (4th Cir. 1977), that right is not absolute. In *Wheat v. United States*, 486 U.S. 153 (1988), the Supreme Court ruled that trial courts "must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Id.* at 163. Although *Wheat* dealt with a decision of a federal district court in California, its rationale applies equally to state court cases in Virginia. The Virginia Code of Professional Responsibility places limitations on the right of clients to waive conflicts of interest. DR 5-105(C); *see Wheat*, 486 U.S. at 160 (California Bar Association rules governing attorneys limited multiple representation).

O'Dell alleges Legler represented another capital defendant, David Pruett, who allegedly confessed to the Schartner murder. This fact, if true, created an actual conflict of interest between Pruett and O'Dell that Legler could not tolerate despite O'Dell's proffered waiver. "Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." *Wheat*, 486 U.S. at 160.

After the Court appointed Paul Ray as new counsel, O'Dell repeatedly sought to have Ray replaced. O'Dell

claims he was convinced that he could not be acquitted if he accepted Ray's representation. Thus, he believed he had "no choice" but to proceed *pro se*, and that, therefore, his waiver of the right to counsel was not voluntary.

Illustrative of the weakness of O'Dell's argument is the following discussion with the trial judge:

THE COURT: All right. Mr. O'Dell, I'm not going to go into a long examination of you on all of this with respect to your motion. You've made two motions before. I pointed out to you repeatedly that you're not a lawyer, that you may have considerable legal knowledge, and you certainly have an adept writing ability.

You've been found to be sane. You have been found to be capable of assisting in your defense and/or proceeding *pro se* to defend yourself after psychiatric examination. So I don't think we need to go through all of the rocks and rapids that we have been through before.

Now, you have made a motion to go *pro se*. I want you to state again for the record that it's your desire you want to go *pro se*.

O'DELL: Yes, sir, it is.

THE COURT: And do you recognize that you're in jail and that the likelihood of you being let out on bond prior to, pending this trial to prepare your defense is somewhere between zero and never?

O'DELL: Yes, sir, I realize that.

THE COURT: And you realize that is going to have some handicap on your ability to prepare for trial?

O'DELL: Yes, sir, I realize that.

THE COURT: All right. And you recall all of the admonishments I have given you before as to what the problems are and the difficulties you may have in examining hostile witnesses who are the prime prosecution witnesses against you?

O'DELL: Yes, I do.

THE COURT: And notwithstanding all those pitfalls, you're willing to take that risk and proceed on your own?

O'DELL: Well, Your Honor, I don't have any choice. It's not being done anyway.

THE COURT: Mr. O'Dell, I'll be happy to hear you on those particular points of what is not being done, but I'll tell you this. From everything I've seen, since Mr. Ray was appointed in this case, he's done everything in his power to get those material things that should be heard before the Court for a hearing, and I've absolutely no evidence whatsoever that this man hasn't done an outstanding job for you at this point or that there is any credibility whatsoever in the allegations which you have made with respect to him. None whatsoever. . . .¹⁹

(Tr. 9:4-6.)

¹⁹ O'Dell voiced concern that Ray refused to file several motions O'Dell had prepared on his own behalf. (Tr. 9:6-8.) The judge appropriately noted that an attorney has a duty to refrain from filing frivolous motions, even at the behest of his client. (*Id.*).

More than six months later, on July 1, 1986, O'Dell's irrational fears concerning Ray had not abated:

O'DELL: Well, Your Honor, with all due respect to Mr. Ray, I know he is a - he is a fine lawyer, Your Honor. We have had too many ups and too many downs, and there is no way that I can accept Mr. Ray back in this case. Even if I have to go to the electric chair, that's just the way I feel about it, and it looks like that's where I'm headed; but . . . I didn't ask for Mr. Ray to get completely out of the case. I asked for the Court to appoint additional counsel and Mr. Ray to be lead counsel, and the Court wouldn't do it, and I just feel that although Mr. Ray worked hard, he tried. I just don't believe he can handle this case. . . .

(Tr. 25:47.)

It is settled that "although an indigent defendant has an absolute right to have counsel appointed to represent him . . . the Sixth Amendment does not guarantee representation by a lawyer in whom the defendant reposes special confidence or with whom the defendant is able to establish a "meaningful relationship." *United States v. Burns*, 990 F.2d 1426, 1437 (4th Cir.) (citing *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) and *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983)), *cert. denied*, 113 S. Ct. 2949 (1993). O'Dell's distrust of Ray was not based on objective facts; it was based on pure speculation.

The remaining grounds for O'Dell's ineffective assistance of counsel claim relate to whether Ray, as stand-by counsel, failed to ensure a proper competency evaluation (Claim 1c), whether the deficiency in O'Dell's defense at the sentencing phase suggested he was incompetent

(Claim Ie),²⁰ whether the Court denied O'Dell the resources necessary to defend himself, and whether stand-by counsel was unable to render effective assistance (Claim Ig).

O'Dell first asserts that Ray failed to provide Dr. Kreider with the information necessary for him to make a proper competency determination. In essence, the petitioner argues that Ray should have been more forceful in getting the prosecutor, Stephen Test, to provide information within his possession to Dr. Kreider.

O'Dell states Dr. Kreider evaluated him without:

information pertaining to the alleged crime, copies of statements O'Dell had made to the police (including one to Detective Dunn when arrested), transcripts of the preliminary hearings to date (including those in which O'Dell declared his intent not to cooperate with any psychiatrist (3:5)), a summary of the reasons for the evaluation request, and a large number of available psychiatric, psychological, medical, and social records relevant to O'Dell's mental state.

(Pet. ¶ 38.)

The shortcoming here is that O'Dell acknowledges Ray asked the court to order the Commonwealth to provide relevant information, the Court so ordered the Commonwealth (although not in writing), and Ray had no

²⁰ This claim overlaps with O'Dell's procedurally barred claims that the trial court failed to monitor his competence to continue *pro se*. It will not be considered on the merits in that respect.

access to the information. Therefore, his performance cannot be considered deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). Whether Test complied with his obligations presents a different issue.

Next, the Petition argues that O'Dell indicated his incompetence to represent himself during the penalty phase by declaring his intention neither to beg for "mercy" nor to present mitigating evidence. (Tr. 56:76-77.) Although his representation and investigation of himself was probably deficient, O'Dell did, in fact, call and question witnesses on his behalf at the penalty phase of the trial. Therefore, the nature of his penalty phase defense – considered alone – did not render him incompetent *per se*.

In Claim If of the Petition, O'Dell argues that he was denied the resources necessary to represent himself. O'Dell complained at trial about having inadequate time to discuss his case with potential experts (Tr. 15:2-4) and the jail's lack of assistance in his legal research (Tr. 8:3, 12-13). He does not identify any specific materials he lacked nor how they would have aided his defense. He was warned about the handicaps he would face defending this case alone, but he chose to do it anyway. (See, e.g., Tr. 6, 9, 12B.) Nothing he alleges in his petition on this issue, (see Pet. ¶ 215-217), amounts to a constitutional violation. See *United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978) (defendant who validly waived counsel had no right of access to legal materials); *Peterkin v. Jeffes*, 855 F.2d 1021, 1042-43 (3d Cir. 1988) (citing *Chatman*).

The petitioner's remaining ground for an ineffective assistance of counsel claim also lacks merit. O'Dell claims that he and Ray had a constitutionally ineffective

"hybrid" arrangement that constantly changed throughout the course of the trial. According to petitioner, this arrangement prejudiced his defense. Although this unfocused, hybrid arrangement was probably destined to fail, the fault lies with O'Dell himself. He vacillated between handling the case *pro se* and allowing Ray to take control. He did so despite repeated warnings from the court. (Pet. ¶ 48-69; *see, e.g.*, Tr. 6, 9, 12B.)

Therefore, because O'Dell has failed to demonstrate any constitutional deficiencies in his representation, it is not necessary for the Court to consider his claim of prejudice under *Strickland*.

VIII. SCIENTIFIC EVIDENCE AND EXPERTS

Claim II of the Petition concerns whether the Commonwealth unconstitutionally thwarted O'Dell's ability to challenge the scientific evidence brought against him. In general, the Commonwealth responds that admission of evidence is ordinarily a state law matter.

Petitioner maintains that one of the most hotly contested issues at trial and on appeal was the admission of the multisystem electrophoretic analysis of blood stains found on O'Dell's clothing. O'Dell asserts that several courts and commentators have rejected the reliability of electrophoresis. (*See* Pet. Opp. Mem., at 32.) Accordingly, he argues that the use of electrophoretic evidence at trial was constitutional error. (*See* Claims IIa-III.)

O'Dell states that most of these issues were erroneously dismissed without a hearing by the state habeas judge. Further, he argues that even where the state

habeas court held a hearing addressing the reliability of electrophoresis, the judge's ruling effectively rendered the hearing moot. The judge ruled that he would not disturb the Virginia Supreme Court's decision admitting the electrophoretic testing – allegedly made prior to the presentation at the hearing of new evidence demonstrating the unreliability of electrophoresis – even though the state habeas judge agreed that "current testing methods would have produced a different result." (Pet. ¶ 176.) Thus, O'Dell argues that none of his claims in Ground II have yet received a full and effective hearing.

O'Dell further argues that a federal habeas court has a constitutional duty to review newly discovered evidence not presented to the trial court. *Townsend v. Sain*, 372 U.S. 293, 317 (1963). Although *Townsend* has been overruled (*Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992)), O'Dell's DNA evidence warranted an evidentiary hearing on his factual innocence claim, *see, supra*, Claim V.

O'Dell has proved that the blood on O'Dell's shirt did not match the victim's blood and that tests of stains on O'Dell's jacket were inconclusive. Thus, petitioner argues that this is *prima facie* evidence that the electrophoretic evidence admitted at trial was unreliable and should have been excluded. Petitioner contends that because the DNA test has so seriously undermined the principal evidence supporting the conviction, no reasonable juror could find O'Dell guilty of the crime charged based on the other evidence presented.

A matter of state law "does not properly concern a federal habeas court unless it impugns the fundamental fairness of the trial." *Stockton v. Virginia*, 852 F.2d 740, 748

(4th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989). Thus, "[e]rrors in the admission or exclusion of evidence in a state criminal trial rise[] to the level of a constitutional deprivation only if the error is of such magnitude as to deny fundamental fairness." *Ward v. Johnson*, 690 F.2d 1098, 1109 (4th Cir. 1982) (citing *Lisenba v. California*, 314 U.S. 219, 227-28 (1941)).

In support of petitioner's claim that the Commonwealth unconstitutionally thwarted his ability to challenge the scientific evidence brought against him, he has argued the trial court erred in admitting electrophoretic evidence (Claim IIa), the Commonwealth failed to show the reliability of the multisystem electrophoretic test performed by expert witness Jacqueline Emrich (Claim IIb), Emrich's technique in performing the test fell below the applicable standard of care (Claim IIc), the Commonwealth's failure to preserve evidence for retesting violated due process (Claim IId), the trial court improperly denied petitioner an *ex parte* hearing in which to make his preliminary showing of a need for funds (Claim IIe), the trial court failed to provide reciprocal discovery (Claim IIff), the trial court refused to limit the Commonwealth's number of experts (Claim IIg), the trial court refused to limit Dr. Guth's testimony to those portions of his report dealing with serology (Claim Ili), and finally, that DNA test results demonstrate that the evidence admitted at trial was inaccurate (Claim IIj). There sub-claims will be addressed in the order in which they were raised.

In Claim IIa, the petitioner states that the Commonwealth did not establish the reliability of the multisystem electrophoretic enzyme test pursuant to the standard set

forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).²¹ Therefore, he argues, the trial court violated his right to due process of law by admitting the test results. The Commonwealth responds that the trial judge properly determined that there was sufficient general acceptance of electrophoresis to enable him to take judicial notice of its reliability.

State courts are split on the reliability of electrophoretic testing. See Michael R. Flaherty, Annotation, *Admissibility, in Criminal Cases, of Evidence of Electrophoresis of Dried Evidentiary Bloodstains*, 66 A.L.R. 4th 588 (1988) (and cases cited). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), the Supreme Court ruled that the Federal Rules of Evidence superseded the *Frye* test for cases in federal court. By implication, a state court's refusal to apply *Frye* does not deny a criminal defendant due process of law. See *id.* at 2796. Although the Virginia Supreme Court refused to adopt the *Frye* test, it noted that "[e]ven if [*Frye*] were the law in Virginia, the evidence was sufficient to meet it." *O'Dell v. Commonwealth*, 364 S.E.2d at 504.²²

²¹ *Frye* held that before scientific evidence could be admitted in a trial, the evidence had to have "gained general acceptance in the particular field in which it belongs." *Id.* at 1014.

²² O'Dell claims that the trial court violated his right to due process of law because the Commonwealth failed to establish the reliability of Emrich's test (Claim IIb), and because Emrich's technique fell below the applicable standard of care (Claim IIc).

The government counters that testimony as to reliability was given by two experts, and the trial court properly rejected contradictory testimony by petitioner's expert. Furthermore, it

Petitioner's next claim is that the Commonwealth's failure to preserve evidence for retesting violated due process and constitutes bad faith (Claim IIId). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (failure to preserve potentially exculpatory semen samples does not violate due process if no evidence of bad faith). O'Dell has not offered any evidence as to bad faith except the nature of the evidence itself.

Youngblood dealt with a case in which the police had failed to preserve semen samples taken from a victim of child molestation, sexual assault, and kidnapping. The *Youngblood* Court explained the reasoning of the earlier case of *California v. Trombetta*, 467 U.S. 479 (1984), which involved the failure of police to preserve breath samples

argues the alleged dangers of any supposed unreliability of electrophoretic evidence were reduced in this case because the trial court refused to admit statistical evidence. It also notes the petitioner was permitted to offer substantial testimony criticizing Emrich's procedures.

As discussed more extensively in regard to O'Dell's innocence claim, DNA evidence has established a "fair probability" that the electrophoretic evidence yielded an erroneous result. However, this ground of contention is primarily a state evidentiary matter. The record demonstrates that O'Dell's stand-by counsel cross-examined Emrich on her testing procedures. (Tr. 48B.) The trial court's decision to admit Emrich's testimony did not undermine the fundamental fairness of the trial, and, therefore, admission of the evidence did not amount to constitutional error. See *Spencer v. Murray*, 5 F.3d at 762-63.

that were potentially useful in prosecutions for drunken driving.

Under *Trombetta*, the failure of the police to preserve evidence did not violate due process where: (a) the officers acted in "good faith and in accord with their normal practice," *Id.* at 488; (b) "in light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim," *Youngblood*, 488 U.S. at 56, and (c) "even if the samples might have shown inaccuracy in the tests, the defendants had 'alternative means of demonstrating their innocence,' " *Youngblood*, 488 U.S. at 56 (quoting *Trombetta*, 467 U.S. at 490).

The state court in *Youngblood* had found that the defendant might have been exonerated had the semen samples been tested in a timely fashion. As a result, the state court reversed the conviction. *Id.* at 54. The Supreme Court reversed. The Court noted that *Trombetta* speaks of evidenced whose exculpatory value is "apparent" and that the exculpatory nature of the evidence must be apparent "before the evidence was destroyed." *Id.* at 56 (footnote) (quoting *Trombetta*, 467 U.S. at 489) (alteration in original).

As in *Youngblood*, there is no indication here that the exculpatory nature of the evidence was apparent to the police before the evidence was destroyed. Instead it was "simply an avenue of investigation that might have led in any number of directions," and is accordingly insufficient evidence of bad faith. *Id.* at 56 (footnote). Additionally, the destruction was made in accordance with routine procedures, and the petitioner had alternative means of

attacking the reliability of the test results. See *O'Dell v. Commonwealth*, 364 S.E.2d at 498.

This case differs from *Youngblood* in one important respect, however. In *Youngblood*, the prosecution did not use the potentially exculpatory evidence in its case in chief. *Id.* at 56. It is possible, therefore, that this Court could infer bad faith by considering the failure to preserve the blood samples in tandem with the use of the government's tests against the petitioner in its case in chief. *Youngblood* did not specifically incorporate the prosecution's use or non-use of the evidence into its analysis, but it is reasonable to conclude that the use of the evidence is merely one factor to consider in deciding the ultimate question of whether the police acted in "bad faith." See *id.* at 58 (bad faith requirement limits obligation to preserve evidence to "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant"). Here, because the exculpatory nature was not apparent at the time of destruction, O'Dell's claim is insufficient as a matter of law.

Petitioner's next ground for relief, Claim IIe, is without merit as well. This claim alleges that in denying O'Dell an *ex parte* hearing in which to make his preliminary showing of need for serological experts, the trial court forced O'Dell to reveal his trial strategy to the prosecution.

As the prosecution contends, there is no authority requiring the holding of such hearings in the absence of the prosecution. *C. Lawson v. Dixon*, 3 F.3d 743 (4th Cir. 1993) (statute requires *ex parte* hearings on motions for

expert assistance in most federal cases). O'Dell argues that requiring him to disclose the identify of his experts to the prosecution in order to secure government funds constitutes an unconstitutional condition of his right to secure witnesses in his favor.²³ The unconstitutional

²³ In order to accept his argument, the Court would have to disagree with the Virginia Supreme Court's finding that the defendant "had no constitutional right requiring the Commonwealth to provide funding of this type of expert assistance." *O'Dell*, 364 S.E.2d at 499.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court required Oklahoma to provide an indigent with access to a psychiatric exam when the defendant's sanity will be an issue in the case. The Court stated that in outlining the contours of the state's obligation to provide indigent defendants with "an adequate opportunity to present their claims fairly within the adversary system," the Court had examined the "basic tools of an adequate defense or appeal." *Id.* at 77. The court in *Ake* identified three factors relevant to deciding whether a state had to pay for a particular defense tool. Those factors were: (a) "the private interest that will be affected by the action of the State," (b) the government interest that will be affected if he [sic] safeguard is to be provided," and (c) "the probable value of the additional or substitute procedural safeguards that are sought and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Id.*

In O'Dell's case, the private interest affected was the interest of a criminal defendant in a murder trial in obtaining an independent expert to test a blood sample left on his clothing to determine whether it matched the victim's blood. The State's use of its own experts in its case in chief heightened O'Dell's need for the evidence. The government interest that would be affected is the increased financial burden that would result of it were required to pay for the defendant's chosen expert. Finally, there is a risk of erroneous conviction if a defendant lacks the scientific knowledge to attack the government expert's conclusions.

conditions doctrine prevents the government from forcing a defendant to choose between two constitutionally protected rights. *United States v. Dent*, 984 F.2d 1453 (7th Cir.) (citing *Simmons v. United States*, 390 U.S. 377, 394 (1968)), *cert. denied*, 114 S. Ct. 169 (1993). It is worth emphasizing that: "The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments [] as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always

Under the *Ake* analysis, both sides have valid arguments, but O'Dell's is the stronger of the two. It is not a stretch from *Ake*'s requirement that a psychiatrist be appointed to O'Dell's argument that he was entitled to his own expert. This is especially true in a case such as this, where the blood test is an important part of the prosecution's case. *See id.* at 80 ("when the State has made the defendant's mental condition relevant . . . the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense"). A similar question was expressly left open in *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (because the defendant "offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process").

However, O'Dell raises this issue only in terms of arguing that the lack of an *ex parte* hearing on his need for expert testimony was an "unconstitutional condition." He does not raise the argument directly that the state's failure to provide money for his own expert prejudiced his ability to present an adequate defense, but merely claims that he was at a disadvantage because the state had more experts than he did. This is because O'Dell was provided with at least one expert, chemist Dr. Joseph Guth. O'Dell declined to call Dr. Guth because the trial court held that Dr. Guth's entire report was subject to cross-examination. (Pet. ¶ 71.)

forbid requiring him to choose." *United States v. Frazier*, 971 F.2d 1076 (4th Cir. 1992) (quoting *Crampton v. Ohio*, 402 U.S. 183, 213 (1971) (citations omitted)), *cert. denied*, 113 S. Ct. 1028 (1993).

Assuming, for the sake of argument, criminal defendants should have the right to an *ex parte* hearing at which they may seek expert assistance, O'Dell would still not be entitled to relief. O'Dell has offered no support for the proposition that his decision to seek the assistance of an expert without the benefit of an *ex parte* hearing resulted in the disclosure of any harmful information. In addition, while O'Dell might have been entitled to reciprocal discovery of the Commonwealth's experts, the trial courts denial of such discovery did not render the trial fundamentally unfair.²⁴ Therefore, O'Dell has not met the threshold necessary to merit an evidentiary hearing on these issues (claims IIe and II f).

The Court now turns to a consideration of whether the trial court's refusal to limit the Commonwealth's

²⁴ The defendant in *Wardius v. Oregon*, 412 U.S. 470 (1973), had been unconstitutionally required to give notice of his intent to use an alibi defense without having any reciprocal discovery rights from the government. Although the defendant here was not specifically required to give notice that he wanted to use experts, *Wardius* is arguably applicable. The theme in *Wardius* was that a criminal trial is a search for truth, not a poker game. *See id.* at 475-76. There is no apparent reason why the government did not disclose the identity of its experts to O'Dell upon his request. However, any prejudice was mitigated by the fact that O'Dell had the benefit of his own expert.

number of experts or, in the alternative, to grant a continuance to allow a particular expert to testify, deprived O'Dell of due process (Claim IIg).

The defendant was denied a continuance in order to secure the testimony of Dr. Benjamin Grunbaum, who was willing to testify but had a commitment abroad. (Pet. ¶ 105.) Dr. Grunbaum was assertedly the "foremost authority on the kind of multisystem electrophoretic testing of bloodstains" performed by the state's expert. *Id.* Instead, the petitioner claims he was relegated to using a geneticist who had no training in the specific test used on the bloodstains. *Id.*

Whether to grant a continuance is ordinarily within the discretion of the trial judge. See *Ungar v. Sarafite*, 376 U.S. 575 (1964) (judge denied continuance to give defendant time to engage counsel). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* at 589. When a criminal defendant offers no more than undeveloped assertions that additional experts would be beneficial, the Supreme Court has indicated that the test to be used in determining whether every prosecution expert must be balanced by a defense expert or be excluded from testifying is one of reasonableness. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 2637 n.1 (1985). The trial judge here was clearly concerned about continuing the trial excessively to accommodate Dr. Grunbaum. He was also concerned about duplicative witnesses. (See Tr. 29:11-12.) Based on a review of the record, the trial judge's decisions to allow

the testimony of the Commonwealth's witnesses, and to deny O'Dell's motion for a continuance, were reasonable under the circumstances.

Continuing his attack on matters primarily within the purview of the state courts, O'Dell avers that the trial judge deprived him of the assistance of an expert by ruling that Dr. Joseph H. Guth could be cross-examined as to any matter in his report, and that O'Dell could not limit Guth's testimony to his serological findings (Claim Ili). O'Dell claimed that because of Guth's findings on other subjects, he "had no choice but to decline to call Dr. Guth at trial." (Pet. ¶ 72.)

The trial judge's ruling on the scope of Dr. Guth's cross-examination did not deprive O'Dell of any constitutional right. Again, such evidentiary matters are properly left to the discretion of the trial judge as long as the judge's ruling does not violate fundamental fairness. See *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475 (1991) (habeas corpus relief does not lie for errors of state law); *Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993).

IX. PAROLE INELIGIBILITY

In *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994), the Supreme Court held that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, the Due Process Clause of the Fourteenth Amendment requires that the sentencing jury be informed that the defendant is not eligible for parole. Before considering whether *Simmons* should affect this Court's analysis of O'Dell's habeas petition (Claim III), the Court must perform a separate, threshold inquiry.

When a petitioner seeks federal habeas relief based upon a principle announced after a final judgment, [*Teague v. Lane*, 489 U.S. 288 (1989)], and our subsequent decisions interpreting it require a federal court to answer an initial question, and in some cases a second. First, it must be determined whether the decision relied upon announced a new rule. If the answer is yes and neither exception applies, the decision is not available to the petitioner. If, however, the decision did not announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent.

Stringer v. Black, 503 U.S. ___, ___, 112 S. Ct. 1130, 1135 (1992).

Thus, the first question is whether *Simmons* announced a new rule. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301; *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 510 (U.S. 1992). There is no question that the precedents guiding the Court's analysis in *Simmons* were well established. *Simmons*, 114 S. Ct. at 2194 (case "cannot be reconciled with our well-established precedents interpreting the Due Process Clause"). As the Supreme Court stated in *Simmons*, the application of those precedents was also well-established under the Due Process Clause:

[I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life

without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole eligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Id. at 2196 (citing *Gardner v. Florida*, 430 U.S. 349 (1977)).²⁵

Although the respondents rely on *Peterson v. Murray*, 904 F.2d 882 (4th Cir.), *cert. denied*, 498 U.S. 992 (1990), to contend that *Simmons* created a new rule, *Peterson* dealt with a defendant who would have been eligible for parole in twenty years. *Id.* at 886. In contrast, the Supreme Court itself cited the Virginia Supreme Court's decision in O'Dell's case as an example of improper reliance on existing precedent.²⁶ Furthermore, the *Peterson* court based its decision on the fact that decisions about parole eligibility are ordinarily not the concern of the state judiciary, but of a state executive department. *Peterson*, 904 F.2d at 886 (citing *Williams v. Commonwealth*,

²⁵ Similarly, such a result would also be dictated by existing precedent under the Eighth Amendment. See *Simmons*, 114 S. Ct. at 2198 (Souter, J., concurring) (Eighth Amendment requires judge to tell jury what "life imprisonment" means, when defendant so requests).

²⁶ "Only two States other than South Carolina have a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse to inform sentencing juries of this fact." *Simmons*, 114 S. Ct. at 2196 (citing *O'Dell v. Commonwealth*, 234 Va. 672, 701, 364 S.E.2d 491, 507, *cert. denied*, 488 U.S. 871 (1988)).

234 Va. 168, 178-80, 360 S.E.2d 361, 367-68 (1987), *cert. denied*, 484 U.S. 1020 (1988)). Those concerns are not present in this case. *See Simmons*, 114 S. Ct. at 2199 (Souter, J., concurring) ("The answer [to whether the defendant would be eligible for parole] was easy and controlled by state statute.")²⁷

The prosecutor in O'Dell's case obviously used O'Dell's prior releases on cross-examination, (*see* Tr. 56:141-144), and in his closing argument, (*see* Tr. 56:178, 202, 204), to argue that the defendant presented a future danger to society.²⁸ On cross-examination during the

²⁷ Although recognizing that withholding information about parole eligibility presented serious constitutional problems, the state trial court was understandably reluctant to depart from state law. Prior to trial, the trial judge described evidence of parole ineligibility as a "very, very relevant matter" in a capital case. He also stated that it "could become a very key issue as to whether the jury should be told at some point what effect [parole] would have on [the defendant], so just bear that in mind. It's going to be a difficult problem for the Commonwealth, [the defendant], and the Court if it becomes an issue; and it very well may." (Tr. 31:61-62.)

²⁸ The jury found "a probability that [O'Dell] would commit criminal acts of violence that would constitute a continuous serious threat to society" (Tr. 56:208.) It additionally found that "his conduct in committing the offense was outrageously wanton, vile or inhuman and it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder" (*Id.*) The Virginia Supreme Court determined on direct appeal that the jury did not base its verdict on the vileness predicate. *O'Dell v. Commonwealth*, 364 S.E.2d at 507.

A review of the record of the sentencing hearing makes clear, as explained below, the danger that the constitutional violation had a "substantial and injurious effect or influence" in

penalty phase of the trial, the following exchange occurred between O'Dell and the prosecutor:

Q: Going back to the date that you have testified you were in prison and released, I think you testified you been [sic] in prison twenty-two years of your adult life; is that correct?

O'DELL: That's correct.

Q: You first went in sometime in 1957?

O'DELL: Went in in 1957 when I was sixteen years old. I went in in 1961 when I was nineteen years old. I went in in 1975 when I was thirty-two years old.

Q: When did you get out from the first time you went in?

O'DELL: I got out on February the 9th, 1961.

Q: And you went back [in] 1961?

O'DELL: That's right.

Q: What date did you go back in?

O'DELL: I went back in September, 1961.

Q: So you were out seven months?

O'DELL: Yes, sir. That was twenty-five years ago, Mr. Test.

Q: You went back in in 1961. When were you released?

O'DELL: I was released January 22, 1974.

the jury's decision to impose the death penalty. *See Brecht v. Abrahamson*, 113 S. Ct. 1710, 1721-22 (1993).

Q: And you were arrested again for the offense regarding Mrs. Doyle on February 5, 1975; is that correct?

O'DELL: Yes, sir.

Q: So you were out approximately thirteen months?

O'DELL: That's correct.

Q: And you were paroled on the offense in Florida on August 3, 1982?

O'DELL: That's correct.

(Tr. 56:142-43.)

In his closing argument, the prosecution used O'Dell's prior releases to his detriment:

[O'Dell] has told you since he was fifteen, except for a sparse three or four years, he has lived behind bars. That has not been enough to prevent the continual mounting of this criminal history. You will recall that someone in this case who testified to you was referred to as a career criminal.

I submit to you ladies and gentlemen if there is a career criminal, it is Joseph Roger O'Dell for he knows nothing else other than violating the laws of this country. Not only in the State of Virginia but in another state as well; and it is interesting, is it not, that there is a graduation of the seriousness of the offenses from use of a car to a robbery to a murder to an abduction and another robbery and now to an other murder?

Isn't it interesting that he is only able to be outside of the prison system for a matter of

months to a year and half before something has happened again?

(Tr. 56:177-78.)

Later, the prosecutor stated:

[Y]ou may sentence him to life in prison, but I ask you ladies and gentlemen in a system, in a society that believes in its criminal justice system and its government, what does this mean?

* * *

I put it to you ladies and gentlemen. What is right in this case is that this man has forfeited his right to live among us because all the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.

(Tr. 56:204.)

As the preceding quotations demonstrate unequivocally, the prosecution put O'Dell's future dangerousness in issue at the penalty phase. Like the defendant in *Simmons*:

[P]etitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death. The State raised the specter of petitioner's future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on

parole and thus, in his view, would not pose a future danger to society.

Simmons, 114 S. Ct. at 2194.

That future dangerousness was an issue at trial does not end the inquiry, however. O'Dell must also show that he is ineligible for parole. Because the Virginia courts did not make specific findings on the issue, the state courts should have the opportunity to make that determination. If O'Dell would have been ineligible for parole at the time of the sentencing hearing, the Due Process Clause's guarantee that a defendant not be convicted on the basis of information that he had no opportunity to "deny or explain," and the Eighth Amendment's requirement of heightened reliability in capital cases, require that O'Dell receive a new sentencing proceeding. See *Simmons v. South Carolina*, 114 S. Ct. at 2190-201 (majority opinion and concurrences); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (due process and Eighth Amendment); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (containing quoted material).

X. PENALTY PHASE INSTRUCTIONS

The petitioner contends that the trial court's instructions to the jury at the penalty phase were constitutionally inadequate because they failed to define "mitigation" and because they allegedly gave undue emphasis to statutory aggravating factors over non-statutory mitigating factors (Claim VII). The Virginia Supreme Court held that the trial court correctly refused to give some instructions on mitigation because either they did

not correctly state Virginia law or they embodied principles of law not applicable to the facts in his case. The court added that the instructions given sufficiently covered the subject of mitigation. See *O'Dell v. Commonwealth*, 364 S.E.2d at 507.

"It is inappropriate for the federal courts on collateral review to go beyond the correction of fundamental errors implicating due process rights and attempt to prescribe the particular form which state jury instructions on mitigation must take, becoming mired in the nuances of definition and technicalities of draftsmanship." *Briley v. Bass*, 750 F.2d 1238, 1245 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985). In this case, the trial court's instructions, (Tr. 56:172-74), did not "render the death sentence in any way mandatory or preclude consideration of any relevant mitigating evidence." See *id.*

XI. CROSS-EXAMINATION OF STEVEN WATSON

Steven Watson, who had been incarcerated with O'Dell in the Virginia Beach city jail, appeared at O'Dell's trial as a surprise government witness. (Tr. 47B.) Watson testified that on the night of March 1, 1985, he and O'Dell had a conversation in which O'Dell confessed to the murder of Helen Schartner. (Tr. 47B:6-8.)

O'Dell argues that by calling Watson as a surprise witness, the Commonwealth prevented any meaningful cross-examination. (Pet. ¶ 297 and Claim VIII.) He also claims that the trial court "sharply curtailed" his efforts to cross-examine Watson on the issue of motive, "notwithstanding O'Dell's proffer that Watson had likely

struck a deal with the Commonwealth in exchange for his testimony against O'Dell." (*Id.*)

"[E]xposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). However, the trial judge has the discretion to impose reasonable limitations on cross-examination. *Delaware v. Van Arsdall*, 476 U.S. 673, 678-79 (1986). Although the trial judge in this case sustained several government objections to cases inquiring into Steven Watson's possible basis, O'Dell cross-examined Watson thoroughly on that subject. Through the cross-examination, O'Dell elicited evidence that Watson might have been angry at O'Dell because of statements O'Dell made about the race of Watson's wife and children, and that Watson might have struck a deal with the government to have charges against Watson and his wife dropped. (*See* Tr. 47B:9-33 and Appendices.) Thus, O'Dell was not denied the right to meaningfully cross-examine Watson.

XII. SUFFICIENCY OF THE EVIDENCE

Much of the factual material relevant to this claim has been discussed previously in reference to O'Dell's innocence claims, and will not be repeated here. (*See, supra*, Part V.) However, the legal standard is different. In evaluating a claim as to the sufficiency of the evidence (Claim IX), "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt." *Jackson v. Virginia*, 443 U.S. 307, 321-324 (1979); *see also Herrera*, 113 S. Ct. at 875 (White, J., applying same standard to factual innocence claim). The findings of the Virginia Supreme Court with respect to the sufficiency of the evidence are presumed correct. *See* 28 U.S.C. § 2254(d).

As stated extensively in reference to O'Dell's innocence claims, a rational trier of fact could have found petitioner guilty of the crimes charged. Aside from the scientific evidence introduced at trial, enough other evidence was introduced to deny this claim.

XIII. EXCULPATORY EVIDENCE

The petitioner next claims that "unusual occurrences leave little doubt that there was a deal between [Steven] Watson and the Commonwealth." The crux of this claim is that Steven Watson, a surprise prosecution witness who testified that O'Dell had confessed to him in prison, has made statements after the direct appeal that indicate a plea agreement existed. (Pet. ¶¶ 108-124 and Claim X.)

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *United States v. Bagley*, 473 U.S. 667 (1985), the prosecution is required to disclose evidence that is both favorable to the accused and "material" to guilt or punishment. The evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. *Bagley*, 473

U.S. at 682. If the petitioner could now prove the existence of a plea agreement, it would surely meet the *Bagley* standard.

Still, the government argues that the Virginia Supreme Court found that no such plea agreement existed, and that this Court is therefore bound by 28 U.S.C. § 2254(d) from revisiting this question. Petitioner counters that he did not receive a "full, fair, and adequate hearing in the State court proceeding" – which is an exception to § 2254 – because of the state habeas court's application of procedural bars. 28 U.S.C. § 2254(d)(6).

O'Dell points to the following as newly discovered evidence obtained after the direct appeal: Watson admitted that (i) he bargained with authorities prior to the dropping of his West Virginia charges; (ii) in response to a letter, he received a telephone call from the Commonwealth's prosecutor in Virginia Beach, which led to a face-to-face meeting, (iii) there "may have been" a deal communicated to his attorney that he did not know about, and (iv) O'Dell might not have actually confessed to the murder. (*See* Petitioner's Reply Mem. at 42-43.) O'Dell argues that combined with restrictions on his cross-examination of Watson, this evidence justifies a hearing in federal court on whether the conviction was obtained by perjured testimony.

Although Watson's statements indicate the possibility that an agreement existed, the new evidence does not merit a hearing. Importantly, the petitioner does not argue that he did not receive a full, fair and adequate opportunity to develop the facts on direct appeal. The state habeas court's application of procedural bars merely

prevented that court from revisiting the Virginia Supreme Court's acceptance of the trial court's factual findings.

If this court were to hold an evidentiary hearing on Watson's status, petitioner would have the burden "to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d). The new evidence about Watson adds doubt about his credibility, but does not rebut the state courts' finding that no plea agreement existed. As stated earlier in this Opinion, O'Dell was offered an ample opportunity at the trial to develop the facts. Watson's post-trial statements alone would not permit this Court to reject the factual findings of the state courts. *See Poyner v. Murray*, 964 F.2d 1404, 1415-16 (4th Cir.) ("Because we are satisfied that [the petitioner] already has been afforded ample opportunity to develop [the] facts, we must deny relief on this claim."), *cert. denied*, 113 S. Ct. 419 (1992).²⁹

XIV. TRIAL JUDGE'S INSTRUCTIONS

O'Dell next argues that the Commonwealth frequently told jurors during voir dire that their role was to "recommend" a sentence of life or death. This problem apparently arose from language in Virginia Code section 19.2-264.2, which states: "In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be

²⁹ Later in his Petition, at Claim XVII, O'Dell again attempts to prove the existence of an agreement between Watson and the Commonwealth in arguing that Watson committed perjury. That claim also must be dismissed. *See* 28 U.S.C. § 2254(d).

imposed unless the court or jury shall . . . (2) recommend that the penalty of death be imposed." Va. Code § 19.2-264.2.

References to the appellate review process are normally off-limits in death penalty cases. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court decided whether a death sentence is valid when the "sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Caldwell*, 472 U.S. at 323. The Court held that leading the jury to believe that ultimate responsibility rests elsewhere undermines the reliability of the jury's exercise of sentencing discretion. *Id.* at 328.

In brief, the *Caldwell* Court rested its decision: (a) on the presumption of correctness appellate courts give to jury determinations, (b) the danger that juries might more freely err in favor of "sending a message" of extreme disapproval of the defendant's acts, (c) the danger of jury bias in favor of giving appellate courts the option to impose a death sentence, and (d) the danger that jurors would minimize the importance of their role. *Id.* at 330-334.

Although the Virginia statute states that the court or jury shall "recommend that the penalty of death be imposed," the word "recommend" presents the same dangers listed in *Caldwell*. See Va. Code § 19.2-264.2. However, although the jurors heard the misleading term "recommend" during voir dire, they were properly instructed at the penalty phase. This fact makes O'Dell's case different from the facts in *Caldwell*, and cures any

constitutional defects in the voir dire. See *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990) (court did not imply jury's recommendation was non-binding), *cert. denied*, 500 U.S. 961 (1991); *Smith v. Dixon*, 996 F.2d 667 (4th Cir. 1993) (citing *Gaskins*). For example, the trial court instructed the jury at least four times during the penalty phase that their responsibility was to "fix" the sentence at death or life imprisonment. (See Tr. 56:172-174.) The verdict forms contained the same term. (See *id.* at 205.)³⁰

XV. COMPOSITION OF THE JURY

According to the petitioner, potential black and hispanic jurors were systematically excluded from the venire before O'Dell's trial. He states: "[T]he large presence of military personnel and the total exclusion of blacks and hispanics [from the venire] most likely resulted from the fact that the trial judge asked the jury clerk to hand pick O'Dell's jury to insure that none of the jury had ever sat on a capital case. The jury clerk misunderstood the judge's request and only selected venirepersons who had never sat on any jury. However the trial judge failed to commence a new voir dire." (Pet. ¶ 333-34.) Thus, O'Dell avers that the state violated his Sixth Amendment right to

³⁰ The trial judge used the word "recommend" once but quickly corrected himself. He stated: "The first instruction which I read to you has been reiterated by the Commonwealth is that in order for you to find the defendant - not to find but to recommend the punishment, fix the punishment at death, you must find one of two things as having been done. . . ." (Tr. 56:204.)

a venire that represented a fair cross-section of the community. (Pet. ¶ 331; Claim XIII.)

The Commonwealth appropriately moves to dismiss this claim on the ground that the petitioner has not offered any evidence of the "active discrimination" necessary to have a viable claim. *See, e.g., United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir.) ("After all, the Constitution does not require that the juror selection process be a statistical mirror of the community; it is sufficient that the selection be . . . gathered without active discrimination."), *cert. denied*, 487 U.S. 1205 (1988). Petitioner's only evidence is that the trial judge instructed the clerk to select a jury that had not served on a capital jury before, and the clerk misinterpreted his request by picking a venire that had never served on any jury previously. This, alone, does not constitute active discrimination.

XVI. JURY SELECTION

The petitioner contends that three jurors were wrongfully retained in the venire despite testifying at voir dire that they might consider a defendant's failure to testify as evidence of his guilt (Claim XIVa). He also claims one juror stated that he would credit the testimony of a police officer over that of another non-police witness,³¹ and that three jurors were excused for cause because they had reservations about imposing the death penalty.

³¹ O'Dell used a peremptory challenge to remove this juror, but he argues that the trial judge should have stricken this juror for cause.

As the Commonwealth argues, the § 2254(d) presumption of correctness applies to the finding of the trial judge that an individual juror is impartial. A reviewing court must decide "whether there is fair support in the record for the state courts' conclusion that the juror would be impartial." *Patton v. Yount*, 467 U.S. 1025, 1036-38 (1984), *cited in Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992).

In *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992), the Fourth Circuit panel considered whether a criminal defendant was denied his Sixth Amendment right to an impartial jury when one of the prospective jurors stated during voir dire that he would believe a police officer's testimony before that of a private citizen. The court held that the defendant's right to an impartial jury was not violated because the record supported the trial judge's conclusion that the juror would be impartial. *Adams*, 965 F.2d at 1317. That juror told the judge that he could decide the case based on the evidence and the instructions. *Id.*

Adams distinguished a case where the court ordered a retrial because the district court failed to ask prospective jurors whether they were biased in favor of police testimony. The difference in *Adams*, stated the court, was that the "police testimony [] did not form a predominant part of the government's case." *Id.* at 1317. In addition, *Adams* could not show that he had been prejudiced, because he still had peremptory strikes available. *Id.*

Based on *Adams*, the petitioner's Sixth Amendment right to an impartial jury was not violated by juror Curtis

Foust being retained in the venire. According to the central theme of the Petition, the blood tests and the jail-house confession – not police testimony – were the predominant part of the prosecution's case. *See id.*

The same reasoning applies to the retention of jurors who stated that they would hold the petitioner's failure to testify against him, and to the exclusion of jurors who had qualms about sentencing a defendant to death. Those factual determinations are covered under § 2254(d), and the state courts' findings must be presumed correct. *See Patton*, 467 U.S. at 1036-38. Petitioner avers that these claims have never received a full and fair hearing on state habeas, but does not make that argument with respect to the state trial court and the state Supreme Court. (*See Reply Mem.* at 51.)

XVII. VOIR DIRE QUESTIONS

Turning to the voir dire, O'Dell maintains that the jury was selected in a manner that unlawfully emphasized a probability that the death sentence would be imposed. He complains that the trial judge "asked each juror eight questions concerning the possibility that they should be excused for opposition to the death penalty, and only two questions on their prejudice in favor of the death penalty." (Pet. ¶ 342 (citing Tr. 34:66, 34:173, 35:22, 35:75, 35:101, 36:30, 37:48, 37:104, 37:142, 38:37, 38:75, 38:83, 38:104, 38:145).)

The respondents correctly point out that no relevant case law in the Fourth Circuit requires that the balance of questions be equal. Thus, the petitioner seeks the creation of a new rule, which is not permissible in federal habeas

corpus proceedings. *See Teague v. Lane*, 489 U.S. 288 (1989).

XVIII. PENALTY PHASE EVIDENCE

During the penalty phase of O'Dell's trial, jurors heard testimony as to his prior criminal history. Two alleged incidents are at issue here (Claim XVI). The first concerns O'Dell's 1964 conviction for the second-degree murder of Lloyd Bess. According to O'Dell, that conviction was "based in large part on the perjured testimony of Walter Heath, an inmate, who stated, in direct contradiction to the testimony of a number of other inmates, that O'Dell had attacked Lloyd Bess." (Pet. ¶ 347.) Next, the petitioner states: "Similarly . . . the court permitted Donna Doyle to testify that O'Dell had kidnapped and sexually assaulted her during the commission of a robbery in Florida in 1975. The sexual assault charges, however, had been dropped for lack of sufficient evidence." (*Id.* at ¶ 348.) Thus, O'Dell argues that, given his "checkered psychiatric history, his criminal record . . . is an unreliable indicator of his criminal disposition." (*Id.* at ¶ 349.)

The Commonwealth responds that the petitioner's first claim – that the jury was permitted to rely upon a conviction based upon perjured evidence – has never been presented in a state court and is procedurally barred. (*See Mem. in Opp.* at 45-46.) Next, the respondents contend that the Doyle testimony was properly admitted as "prior unadjudicated conduct" presenting no constitutional infirmities. The petitioner did not respond

to the respondents' arguments for dismissal of these claims.

The first claim is procedurally barred. See *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975). The Doyle evidence claim was reviewed by the Virginia Supreme Court, which examined Florida court records and found no reference to a dismissal of the charges. That factual finding is presumed correct, and nothing O'Dell alleges could rebut that determination by convincing evidence. See 28 U.S.C. 2254(d).

XIX. EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The Due Process Clause of the Fourteenth Amendment guarantees a convicted defendant effective assistance of counsel on his direct appeal. See *Evitts v. Lucey*, 469 U.S. 387 (1985). It is unnecessary for the Court to inquire as to whether appellate counsel was deficient in representing O'Dell on his direct appeal. Because O'Dell has not established that any deficiency in his representation caused him prejudice, he has failed to state a claim for ineffective assistance of appellate counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984).

XX.³² STATE SUPREME COURT'S APPLICATION OF PROCEDURAL BARS

The petitioner's next claim is that "the Supreme Court of Virginia [applied its procedural bar rules] so broadly and reflexively that it curtailed O'Dell's constitutional right to have his death sentence meaningfully reviewed by an appellate court, while serving no legitimate state interest." (Pet. ¶ 369; Claim XX.)

Obviously, this Court is bound by a state court's determination of the applicability of its procedural rules. See *Wainwright v. Sykes*, 433 U.S. 72 (1977). As indicated earlier in this Opinion, (see, *supra*, Part IV), the federal courts are obligated to consider claims procedurally barred by state law only when the application of the procedural bar abridges a federal constitutional right. The Court has considered on the merits claims otherwise procedurally barred by *Coleman* and found them to be without merit.

XXI. PRECLUSION OF STATE HABEAS REVIEW

In Claim XXI of his Petition, O'Dell makes three independent arguments that the state courts denied him a full and fair adjudication of the claims presented in his state habeas corpus petition. First, he argues that the

³² This and the remaining claims were improperly numbered in the Petition and the respondents' Memorandum in Support of the Motion to Dismiss. The Court has used the corrected chart of the claims, which is attached as Exhibit A to the petitioner's Memorandum in Opposition to the Motion to Dismiss.

Virginia courts' application of the procedural bars discussed in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970) and *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975), undermines the principle of comity underlying the exhaustion requirement of federal habeas corpus. (See Pet., ¶ 378 (citing *Rose v. Lundy*, 455 U.S. 509, 518 (1982)).)

Petitioner's claim has been expressly rejected by this Court in a prior case, and the Court adheres to its reasoning. See *Pruett v. Thompson*, 771 F. Supp. 1428, 1439 (E.D. Va. 1991) (Opinion of Spencer, J.) ("Petitioner's argument about the logical inconsistency between a finding of repetition [*Hawks*] and procedural default [*Slayton*] is also meritless."), aff'd, 996 F.2d 1560 (4th Cir.), cert. denied, 114 S. Ct. 487 (1993). *Hawks* does not bar this Court from deciding any claims on collateral review. *Slayton* is a procedural bar. *Id.*; *Turner v. Williams*, 812 F. Supp. 1400, 1414 n.11 (E.D. Va. 1993).

Next, O'Dell argues that the state habeas court should have made findings of fact and conclusions of law on (i) O'Dell's competency to represent himself, (ii) Dr. Krieder's qualifications, and (iii) whether sufficient information was provided to Dr. Krieder before he determined O'Dell to be competent. He also argues the habeas court should have granted relief based on his DNA evidence. As stated earlier in this Opinion with respect to O'Dell's competency and innocence claims, (see, *supra*, Part V), the

arguments will be rejected.³³ Therefore, he has suffered no prejudice from the state habeas court's failure to make findings on these issues.

XXII. ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT

O'Dell claims that electrocution is cruel and unusual punishment under the Eighth Amendment. This claim seeks the creation of a new rule, and will be rejected for that reason. Cf. *Glass v. Louisiana*, 471 U.S. 1080 (1985) (Brennan, J., dissenting from denial of certiorari).

XXIII. CONCLUSION

For the reasons set forth above, the Court finds that petitioner Joseph Roger O'Dell, III, was deprived of due process and subjected to cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, because the trial court failed to allow petitioner to rebut the prosecutor's argument as to petitioner's future dangerousness with evidence that he would be ineligible for parole under state law. There is a reasonable probability that this constitutional error had a "substantial and injurious effect or influence" in the jury's decision to impose the death penalty. See *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1721-22 (1993).

³³ The Court did not determine whether the trial court should have revisited the subject of O'Dell's competency. This claim is barred by *Wainwright v. Sykes*. (See, *supra*, Part IV.)

The petitioner was unable to demonstrate, at the evidentiary hearing in this Court on August 2, 1994, that he is innocent of the crime such that otherwise procedurally defaulted claims should be reviewed on the merits, *see Sawyer v. Whitley*, 505 U.S. ___, 112 S. Ct. 2514 (1992), or that newly discovered DNA evidence would render the execution of petitioner unconstitutional, *see Herrera v. Collins*, 113 S. Ct. 853 (1993).

Petitioner's remaining claims will be dismissed without an evidentiary hearing.

Accordingly, the Court will grant petitioner's petition for habeas corpus filed pursuant to 28 U.S.C. § 2254, and remand the case to the Circuit Court of the City of Virginia Beach for a new sentencing proceeding.

An appropriate Final Order shall issue.

/s/ James R. Spencer
UNITED STATES
DISTRICT JUDGE

Date: SEP 6 1994

United States Court of Appeals,
Fourth Circuit.

Joseph Roger O'DELL, III,
Petitioner-Appellee,

v.

J.D. NETHERLAND, Warden, Mecklenburg
Correctional Center; Ronald J. Angelone,
Director, Virginia Department of Corrections;
James S. Gilmore, III, Attorney General of the
Commonwealth of Virginia; Commonwealth of
Virginia, Respondents-Appellants.

Joseph Roger O'DELL, III,
Petitioner-Appellant,

v.

J.D. NETHERLAND, Warden, Mecklenburg
Correctional Center; Ronald J. Angelone,
Director, Virginia Department of Corrections;
James S. Gilmore, III, Attorney General of the
Commonwealth of Virginia; Commonwealth
Of Virginia, Respondents-Appellees.

Nos. 94-4013, 94-4014.

Argued Dec. 5, 1995.

Decided Sept. 10, 1996.

Before WILKINSON, Chief Judge, and RUSSELL,
WIDENER, HALL, MURNAGHAN, ERVIN, WILKINS,
NIEMEYER, HAMILTON, LUTTIG, WILLIAMS,
MICHAEL, and MOTZ, Circuit Judges.

Judge LUTTIG wrote the opinion, in which Chief
Judge WILKINSON and Judges RUSSELL, WIDENER,
WILKINS, NIEMEYER, and WILLIAMS joined. Judge

ERVIN wrote an opinion concurring in part and dissenting in part, in which Judges HALL, MURNAGHAN, HAMILTON, MICHAEL, and MOTZ joined.

OPINION

LUTTIG, Circuit Judge:

The United States District Court for the Eastern District of Virginia vacated the death sentence of Joseph Roger O'Dell III on federal *habeas*, holding that *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), was not a "new rule" under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and that O'Dell "was deprived of due process and subjected to cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, because the trial court failed to allow petitioner to rebut the prosecutor's argument as to petitioner's future dangerousness with evidence that he would be ineligible for parole under state law," J.A. at 355. The district court also denied numerous other claims of O'Dell's, including his claim that new evidence demonstrates that he is actually innocent.

Heeding the instruction of three Members of the Supreme Court that this case "should . . . receive careful consideration," *O'Dell v. Thompson*, 502 U.S. 995, 999, 112 S.Ct. 618, 620, 116 L.Ed.2d 639 (1991) (Blackmun, J., joined by Stevens and O'Connor, JJ.), both the federal district court and now the full *en banc* court have painstakingly canvassed the record, carefully considering every claim that has been advanced by petitioner. Having done so, we are convinced that O'Dell's claims are without merit and

his claim of actual innocence not even colorable. We are likewise convinced that the federal district court erred in concluding that *Simmons* did not announce a new rule. In *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), every Member of the Supreme Court apparently approved, as constitutionally permissible, the very practice later held unconstitutional in *Simmons*. The only even arguably contrary authority was a plurality opinion and a single footnote which three Members of the Court believed represented an "abandonment" of the due process holding that O'Dell now contends compelled the result in *Simmons*. In our judgment, *Simmons* was the paradigmatic "new rule." Accordingly, we affirm the district court's denial of O'Dell's secondary claims and reverse the district court's judgment granting the writ of *habeas corpus*.

I.

Over ten years ago, on Tuesday, February 5, 1985, 44-year-old Helen Schartner left the County Line Lounge in Virginia Beach around 11:30 p.m. O'Dell left the same nightclub sometime between 11:30 p.m. and 11:45 p.m. The next day, Schartner's car was found in the parking lot of the County Line Lounge, and, around 3:00 p.m., her body was found in a muddy field across the highway from the club. Tire tracks consistent with the tires on O'Dell's car were found near the body. Schartner had been killed by manual strangulation, with a force sufficient to break bones in her neck and leave finger imprints. She also had eight separate wounds on her head consistent with blows from the barrel of a handgun. About 10 days earlier, a handgun with a barrel that could

cause wounds like those found on Schartner's head had been seen in O'Dell's car. Seminal fluid was found in Schartner's vagina and anus. Enzyme tests on that fluid revealed that it was consistent with a mixture of O'Dell's and Schartner's bodily fluids. Spermatozoa also found in Schartner's genital swabs and genital scrapings were consistent with O'Dell's.

Schartner's head wounds had bled extensively. Not more than two and a half hours after Schartner left the County Line Lounge, O'Dell entered a convenience store with blood on his face, hands, hair, and clothes. Around 7:00 a.m., O'Dell called his former girlfriend, Connie Craig, and told her he had vomited blood all over his clothes and that he wanted to talk to her before he left for Florida. He then slept all day at Craig's house.

The next day, Thursday, Craig read the local newspaper account of Schartner's murder, describing how she had last been seen at the County Line Lounge. Remembering that O'Dell customarily visited the County Line Lounge on Tuesday nights, Craig went to her garage and found the paper bag that O'Dell had told her he had left, containing several articles of bloody and muddy clothing. She brought the bloody clothes into the house and called the police.

O'Dell was arrested, and, despite the contrary story he had just told Craig, told the police that the blood on his clothes came from a nose bleed caused by being struck while attempting to stop a fight at another club on the night of February 5. Electrophoretic tests on the dried blood established that the blood on O'Dell's jacket and shirt had the same enzyme markers as Schartner's, a

characteristic shared by only three out of a thousand people. O'Dell's blood did not have the same markers. Likewise, dried blood found in O'Dell's car proved consistent with Schartner's but not with O'Dell's. And, hairs found in O'Dell's car were also consistent with Schartner's, but not O'Dell's.

During his incarceration, O'Dell confessed to Steven Watson, a fellow inmate, that he had strangled Schartner after she refused to have sexual intercourse with him.

O'Dell was indicted for capital murder, abduction, rape, and sodomy. On his own motion, and after a court-appointed psychiatrist determined him competent, O'Dell quite ably defended himself *pro se*, with court-appointed attorney Paul Ray serving as standby counsel. O'Dell was tried, and, on September 10, 1986, the jury convicted him on all counts. The next day, the jury fixed his sentence for murder at death. The jury's recommendation of death was based on its finding that both of Virginia's statutory aggravating factors – future dangerousness and vileness – had been proven. J.A. at 2506. The trial judge adopted the jury's recommendation and sentenced O'Dell to death by electrocution for murder and to 40 years for rape and 40 years for sodomy. O'Dell appealed his sentence to the Supreme Court of Virginia, which affirmed the judgment of the Circuit Court. *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988). The Virginia Supreme Court subsequently granted O'Dell's petition for rehearing in order to consider and reject a claim it had previously held to be procedurally barred, after which it again affirmed the conviction. *O'Dell v. Commonwealth*, Record No. 861219, slip op. (Va. April 1, 1988). The United States Supreme

Court denied *certiorari* on October 3, 1988. *O'Dell v. Virginia*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988).

O'Dell filed a petition for a writ of *habeas corpus* in the Circuit Court of Virginia Beach on June 1, 1989, and an amended petition on July 3, 1990, both of which were denied. J.A. at 278-79. O'Dell attempted to appeal the denial to the Virginia Supreme Court, but he erroneously filed an "Assignments of Error" with the Supreme Court instead of a "Petition for Appeal," as required by Virginia law. O'Dell attempted to correct the error, but by then the time to file had expired and so the Virginia Supreme Court dismissed his perfected Petition for Appeal as untimely. The United States Supreme Court again denied *certiorari* on December 2, 1991, with three Justices issuing a statement respecting the denial of *certiorari*. See *O'Dell*, 502 U.S. at 995, 112 S.Ct. at 618 (Blackmun, J., joined by Stevens and O'Connor, JJ.).

O'Dell then filed this federal *habeas* petition on July 23, 1992. The district court, Judge James R. Spencer, held a full evidentiary hearing on O'Dell's claim that new DNA evidence established that he was actually innocent. The court rejected that claim, along with numerous others, but vacated O'Dell's death sentence because he had not been allowed to rebut the prosecution's future dangerousness arguments with a showing that he would be ineligible for parole. In so doing, the court held that this rule, announced in *Simmons*, was not a new rule under *Teague*. The Commonwealth of Virginia appeals this latter holding, and O'Dell cross-appeals the denial of his numerous other claims.

II.

O'Dell, born in 1941, began his criminal career at age 13 with a juvenile conviction for breaking and entering, followed by five convictions over the next three years for auto theft. By 1958, O'Dell had turned violent. In that year, he was convicted of assault three times and of threatening bodily harm once. The following year, he was convicted of attempted escape from prison. After being released from the penitentiary, he returned five months later when his probation was revoked. He was then convicted of five armed robberies and five unauthorized uses of motor vehicles and sentenced to 24 years in prison. While imprisoned, O'Dell was convicted of second degree murder. In July of 1974, O'Dell was again paroled, whereupon he went to Florida and was promptly convicted of kidnapping and robbery, committed just seven months after his release from prison. The victim in that case testified that O'Dell had struck her several times on the head with his gun, choked her, and held a cocked gun to her head in an attempt to force her to submit to sexual advances. The Florida court sentenced him to 99 years in prison, but, inexplicably, O'Dell was paroled yet again in December of 1983. Fourteen months later, Helen Scharner was murdered.

Under Virginia law, "[a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon . . . shall not be eligible for parole." Va.Code § 53.1-151(B1). O'Dell certainly appears to have had the requisite number of violent felony convictions to be ineligible for parole under Virginia law. Therefore, he

requested that he be allowed to respond to the prosecution's arguments of future dangerousness by arguing that he was parole ineligible. J.A. at 2308, 2378-79, 2385-86. As required by Virginia law, however, the trial judge neither allowed O'Dell to argue his parole ineligibility nor provided the jury with any information regarding O'Dell's ineligibility. J.A. at 2386. See *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, 828 (1985) ("The jury had no right to know what might happen to defendant, in terms of parole eligibility, after sentencing. During the penalty phase it was the jury's duty to assess the penalty, irrespective of considerations of parole."), *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985). Eight years later, the Supreme Court, in *Simmons*, held that due process requires that a criminal defendant be allowed to argue his parole ineligibility to rebut prosecution arguments of future dangerousness. O'Dell seeks the benefit of the rule of *Simmons*, and the Commonwealth argues that *Simmons* announced a new rule under *Teague*.

A.

The question of whether a rule is "new" for purposes of *Teague* arises in two different circumstances: first, where, like here, a particular case is decided after petitioner's conviction becomes final, and petitioner seeks the benefit of the rule of that case; and second, where petitioner seeks the extension of longstanding precedent. Cf. *Stringer v. Black*, 503 U.S. 222, 227-28, 112 S.Ct. 1130, 1134-35, 117 L.Ed.2d 367 (1992). In both instances, the *Teague* inquiry is a threshold matter. *Graham v. Collins*, 506 U.S. 461, 466, 113 S.Ct. 892, 897, 122 L.Ed.2d 260 (1993); *Saffle v. Parks*, 494 U.S. 484, 487, 110 S.Ct. 1257, 1259, 108

L.Ed.2d 415 (1990). As the Court held in *Caspari v. Bohlen*, 510 U.S. 383, 389, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994), "if the State . . . argue[s] that the defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* before considering the merits of the claim." Therefore, before turning to the merits of O'Dell's claim or attempting to define the precise contours of *Simmons*, our first inquiry must be whether *Simmons* announced a new rule under *Teague*. See also *Sawyer v. Smith*, 497 U.S. 227, 233-34, 110 S.Ct. 2822, 2826-27, 111 L.Ed.2d 193 (1990); *Wright v. West*, 505 U.S. 277, 310, 112 S.Ct. 2482, 2500, 120 L.Ed.2d 225 (1992) (Souter, J., concurring in the judgment). But see *Wright*, 505 U.S. at 309, 112 S.Ct. at 2499 (Kennedy, J., concurring in the judgment). As explained in *Caspari*,

a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must survey the legal landscape as it then existed, and determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

510 U.S. at 389, 114 S.Ct. at 953 (internal quotation marks and citations omitted).

O'Dell's conviction became final on October 3, 1988, when the United States Supreme Court denied his petition for *certiorari* on direct appeal. See *O'Dell v. Virginia*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988). Therefore, we must "survey the legal landscape" in October of 1988 to determine whether the result of *Simmons* (and the accompanying rule necessary to produce that result) was dictated by precedent existing at the time O'Dell's conviction became final. *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." (first emphasis added)). As the Supreme Court has stated repeatedly, a rule sought by a habeas petitioner is "new," and thus consideration of the underlying claim barred, unless reasonable jurists considering the petitioner's claim at the time his conviction became final " 'would have felt compelled by existing precedent' to rule in his favor." *Graham*, 506 U.S. at 467, 113 S.Ct. at 897 (emphasis added) (quoting *Saffle*, 494 U.S. at 488, 110 S.Ct. at 1260).¹ The inquiry is not merely whether the

¹ See also *Penry v. Lynaugh*, 492 U.S. 302, 313, 109 S.Ct. 2934, 2944, 106 L.Ed.2d 256 (1989) ("[W]e must determine, as a threshold matter, whether granting [Penry] the relief he seeks would create a 'new rule.' " (emphasis added) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070)); *Graham*, 506 U.S. at 472, 113 S.Ct. at 900 ("We cannot say that reasonable jurists considering petitioner's claim in 1984 would have felt that these cases 'dictated' vacatur of petitioner's death sentence." (emphasis added) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070)); *id.* at 476, 113 S.Ct. at 902 ("This distinction leads us to conclude that neither *Penry* nor any of its predecessors 'dictates' the relief *Graham* seeks within the meaning required by *Teague*." (emphasis added)); *id.* at 477, 113 S.Ct. at 903 ("We cannot say that all reasonable jurists would have deemed themselves compelled to accept *Graham's*

"claim" was "predicated" on preexisting precedent or whether the "challenge" was "dictated" by such precedent; it is sufficient that prior decisions "inform, or even control or govern, the analysis of" a petitioner's claim. *Saffle*, 494 U.S. at 491, 110 S.Ct. at 1262. See also *Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828 (quoting *Saffle*); *Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990) (noting that a decision within the "logical compass" of an earlier decision may nonetheless announce new rule). Rather, the result of the case must

claim in 1984." (emphasis added)); *Stringer*, 503 U.S. at 228, 112 S.Ct. at 1135 (*Teague* inquiry asks "whether granting the relief sought [by the petitioner] would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." (emphasis added)); *id.* at 227, 112 S.Ct. at 1135 ("[A] case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas corpus relief unless the decision was dictated by precedent" (emphasis added)); *Johnson v. Texas*, 509 U.S. 350, 365, 113 S.Ct. 2658, 2667, 125 L.Ed.2d 290 (1993) ("In rejecting the contention that *Penry* dictated a ruling in the defendant's favor [in *Graham*], we stated that" (emphasis added)); *id.* ("We also did not accept the view that the *Lockett* and *Eddings* line of cases, upon which *Penry* rested, compelled a holding for the defendant in *Graham*" (emphasis added)); *id.* at 366, 113 S.Ct. at 2668 ("We concluded that, even with the benefit of the subsequent *Penry* decision, reasonable jurists at the time of *Graham's* sentencing 'would [not] have deemed themselves compelled to accept *Graham's* claim.' " (emphasis added) (quoting *Graham*, 506 U.S. at 477, 113 S.Ct. at 903)); *id.* ("Thus, we held that a ruling in favor of *Graham* would have required the impermissible application of a new rule under *Teague*." (emphasis added)); *Caspari*, 510 U.S. at 389, 114 S.Ct. at 953 ("The nonretroactivity principle prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final." (emphasis added)).

have been compelled by then-existing precedent, as even the dissenting Justices in the continuing debate over the contours of the "new rule" doctrine agree.²

We have suggested otherwise in several recent cases, see, e.g., *Turner v. Williams*, 35 F.3d 872 (4th Cir.1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1359, 131 L.Ed.2d 216 (1995), and *Ostrander v. Green*, 46 F.3d 347 (4th Cir.1995). Both *Turner* and *Ostrander* applied broad formulations, asking

² Justice Souter, for example, who authored the dissent in *Graham*, could not have been clearer as to this requirement of the "new rule" doctrine when he wrote in *Wright* that, "[t]o survive *Teague*, [a rule] must be 'old' enough to have predated the finality of the prisoner's conviction, and specific enough to dictate the rule on which the conviction may be held to be unlawful." 505 U.S. at 311, 112 S.Ct. at 2500 (Souter, J., concurring in the judgment) (emphasis added); see also *id.* at 313, 112 S.Ct. at 2502 ("[I]n light of authority extant when [petitioner's] conviction became final, its unlawfulness must be apparent." (emphasis added)). Justice Brennan has also acknowledged that this is the standard governing federal habeas review. As he stated in *Butler*, the Court in *Teague* "declared that a federal court entertaining a state prisoner's habeas petition generally may not reach the merits of the legal claim unless the court determines, as a threshold matter, that a favorable ruling on the claim would flow from the application of [preexisting] legal standards." 494 U.S. at 417, 110 S.Ct. at 1218-19 (Brennan, J., dissenting) (emphasis added); see also *id.* at 417-18, 110 S.Ct. at 1219 ("Put another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." (emphasis added)); *West*, 505 U.S. at 291, 112 S.Ct. at 2490 ("[A] federal habeas court 'must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable.'" (emphasis added) (quoting *Butler*, 494 U.S. at 422, 110 S.Ct. at 1221 (Brennan, J., dissenting))).

whether prior caselaw "dictated petitioner's challenge" or whether petitioner's challenge was "predicated on" prior caselaw. Applying the first locution of whether prior precedent "dictates the challenge," alone would result in an inestimable number of cases in which federal courts would be obliged to undertake full merits review of reasonable, and in many instances unassailable, state court judgments. For in many cases that are not currently reviewable on federal habeas, the state court's judgment (against the petitioner) will have been dictated by existing precedent. Any cases not subject to review under the "dictates the challenge" locution would undoubtedly be subject to review under the alternative formulation that the "new rule" doctrine does not bar consideration of any claim "predicated on" prior caselaw. This formulation renders reviewable on habeas essentially every claim, for virtually every habeas petitioner necessarily "predicates" his claims on prior caselaw.

These consequences of the formulations of the "new rule" inquiry embraced in *Turner* and *Ostrander* underscore the error of those two decisions. The very purpose of *Teague* was to halt federal habeas review even of state court interpretations of federal law that ultimately prove incorrect, provided they are reasonable. Yet under the reasoning of those two cases, federal courts would be reviewing and deciding on the merits countless state court judgments that are not only reasonable but, indisputably correct.

Thus, both locutions discussed in *Turner* and *Ostrander* would frustrate the principles of finality, comity toward state judicial tribunals, see *Teague*, 489 U.S. at 310, 109 S.Ct. at 1075 (explaining that "[s]tate courts are

understandably frustrated' " when federal *habeas* courts reverse their reasonable rulings on federal law) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n. 33, 102 S.Ct. 1558, 1572 n. 33, 71 L.Ed.2d 783 (1982)), and respect for state prosecutorial authorities, see *Teague*, 489 U.S. at 310, 109 S.Ct. at 1075 (stating that federal review should not require states "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards"), that prompted adoption of *Teague's* "new rule" doctrine in the first place.

Therefore, *Turner* and *Ostrander* are today overruled to the extent they suggest that the bar of *Teague* is inapplicable if a petitioner's challenge is merely "predicated on" prior caselaw or if prior caselaw merely "dictates petitioner's challenge." As the Supreme Court has consistently held, extant caselaw must compel not only the challenge, but the actual relief that petitioner seeks.

The result of the case in question (here, *Simmons*) must also have been compelled *because* of the rule that the petitioner seeks. In making this determination, of course, the "rule" must be identified at the appropriately specific level of generality. The appropriate level of generality for identifying the rule is that level represented by the narrowest principle of law that was actually applied in order to decide the case in question. Thus, for example, as we held in *Townes v. Murray*, 68 F.3d 840 (4th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 831, 133 L.Ed.2d 830 (1996), the most specific principle of law applied in *Simmons*, and therefore the "rule" of *Simmons*, is "that '[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process

entitles the defendant to inform the capital sentencing jury - by either argument or instruction - that he is parole ineligible.' " *Id.* at 850 (quoting *Simmons*, 512 U.S. at ___ 114 S.Ct. at 2201 (O'Connor, J., concurring in the judgment)). To frame the rule more broadly - for example, as that of "due process" or "the right to be heard" or generally as "the right to rebut the State's arguments" or "the need for reliability in capital sentencing" - would vitiate *Teague*. As the Chief Justice explained for the Court recently in *Gray v. Netherland*, ___ U.S. ___, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), for example,

The dissent argues that petitioner seeks the benefit of [*Gardner's*] well-established rule, that "a capital defendant must be afforded a meaningful opportunity to explain or deny the evidence introduced against him at sentencing." . . . But . . . the new-rule doctrine "would be meaningless if applied at this level of generality."

Id. at ___ 116 S.Ct. at 2084 (quoting *Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828); see also *Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828 ("In petitioner's view, *Caldwell* [v. *Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985),] was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this level of generality." (emphasis added) (citing *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987), with the following parenthetical: "[I]f the test of 'clearly established law' were to be applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract

rights." (emphasis added); *Gilmore v. Taylor*, 508 U.S. 333, 344, 113 S.Ct. 2112, 2119, 124 L.Ed.2d 306 (1993); *Wright*, 505 U.S. at 311-12, 112 S.Ct. at 2500-01 (Souter, J., concurring in the judgment).

As the Supreme Court's repeated analogy to the qualified immunity analysis confirms, the new rule analysis fundamentally asks the same question as does the qualified immunity analysis – whether a contrary conclusion would have been *objectively unreasonable*. Cf. *Hogan v. Carter*, 85 F.3d 1113, 1996 WL 292031 at *4 n. 3 (4th Cir.) (*en banc*); 28 U.S.C. § 2254(d)(1) (as amended April 24, 1996). The varying formulations for the new rule test that have, from time to time, been employed by the Court³ are but myriad faces of the same basic inquiry: whether it would have been objectively unreasonable, under the law existing at that time, for a judge to reach a contrary result

³ See, e.g., *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 ("In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."); *Penry*, 492 U.S. at 314, 329, 109 S.Ct. at 2944, 2952 (quoting *Teague*); *Butler*, 494 U.S. at 412, 110 S.Ct. at 1216 (citing *Penry*); *Saffle*, 494 U.S. at 488, 110 S.Ct. at 1260 (quoting *Teague*); *Graham*, 506 U.S. at 467, 113 S.Ct. at 897 (quoting *Teague*); see also *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 ("To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."); *Penry*, 492 U.S. at 314, 109 S.Ct. at 2944 (quoting *Teague*); *Butler*, 494 U.S. at 412, 110 S.Ct. at 1216 (quoting *Penry* (quoting *Teague*)); *Saffle*, 494 U.S. at 488, 110 S.Ct. at 1260 (quoting *Teague*); *Sawyer*, 497 U.S. at 234, 110 S.Ct. at 2827 (quoting *Teague*); *Graham*, 506 U.S. at 467, 113 S.Ct. at 897 (quoting *Teague*); *Gilmore*, 508 U.S. at 340, 113 S.Ct. at 2116 (quoting *Butler* (quoting *Penry* (quoting *Teague*))); *Caspari*, 510 U.S. at 389, 114 S.Ct. at 953 (quoting *Teague*).

to that subsequently reached. As the Court explained in *Butler*, 494 U.S. at 414, 110 S.Ct. at 1217, "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." See also *Graham*, 506 U.S. at 467, 113 S.Ct. at 897 (quoting *Butler*, 494 U.S. at 414, 110 S.Ct. at 1217). The question is "whether a state court considering [petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution." *Saffle*, 494 U.S. at 488, 110 S.Ct. at 1260 (emphasis added); see also *Graham*, 506 U.S. at 467, 113 S.Ct. at 897. Whenever the "outcome" of a case was "susceptible to debate among reasonable minds," *Butler*, 494 U.S. at 415, 110 S.Ct. at 1217, or among "reasonable jurists," *Sawyer*, 497 U.S. at 234, 110 S.Ct. at 2827, then that case announced a new rule. See also *Butler*, 494 U.S. at 417-18, 110 S.Ct. at 1218-19 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting) ("[A] state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." (second emphasis added)); *Graham*, 506 U.S. at 467, 476, 113 S.Ct. at 897, 902; *Stringer*, 503 U.S. at 238, 112 S.Ct. at 1140 (Souter, J., dissenting).

B.

As noted, the narrowest principle of law that was applied in order to decide *Simmons* was that applied by Justice O'Connor in her separate concurrence: "[w]here

the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible.” 512 U.S. at ___, 114 S.Ct. at 2201 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in the judgment). Therefore, unless it would have been objectively unreasonable for a state court in 1988 (when O'Dell's conviction became final) to conclude that the Constitution did not require that the jury be informed of parole ineligibility, *Simmons* must be held to have announced a new rule.

“Surveying the legal landscape” in 1988, *Graham*, 506 U.S. at 468, 113 S.Ct. at 898, a reasonable jurist would have been faced with the following caselaw. First, that jurist would have been confronted with the cases upon which *Simmons* principally relied, *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). In *Gardner*, the Court vacated a death sentence because the sentencing court had relied in part on a secret presentence report that the defendant never had an opportunity to see or to rebut. The three-Justice plurality concluded that “petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.” 430 U.S. at 362, 97 S.Ct. at 1206 (Stevens, J., joined by Stewart and Powell, JJ.). Under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), however, the holding of *Gardner* is the “position taken by those Members who concurred in

the judgment[] on the narrowest grounds”; therefore, the holding of *Gardner* is found in Justice White's opinion, in which he concurred in the judgment on the narrow and fact-specific ground that reliance upon *secret* information in sentencing a man to death violates the Eighth Amendment – although not necessarily due process. *Gardner*, 430 U.S. at 364, 97 S.Ct. at 1207 (White, J., concurring in the judgment).

In 1988, a reasonable jurist would also have considered *Skipper*, where the Court vacated a death sentence because, in violation of the Eighth Amendment rule of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the jury had been prevented from hearing the defendant's evidence of previous good behavior in jail. *Skipper*, 476 U.S. at 4, 106 S.Ct. at 1670. Specifically, the Court held that “evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating,” and that “[u]nder *Eddings*, such evidence may not be excluded from the sentencer's consideration.” *Id.* at 5, 106 S.Ct. at 1671.

The sole question upon which *certiorari* was granted in *Skipper* was whether, under the Eighth Amendment, the lower court's decision was “inconsistent with th[e] Court's decisions in *Lockett* and *Eddings*.” *Id.* at 4, 106 S.Ct. at 1670. And the Court noted that this Eighth Amendment issue was “the only question before [it].” *Id.* One footnote in *Skipper*, however, read as follows:

The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this

particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977).

Id. at 5 n. 1, 106 S.Ct. at 1671 n. 1. In addition to this footnote, which provides the strongest suggestion that the due process rule announced in *Simmons* was not new, three Justices also joined a separate opinion concluding that, although Skipper's death sentence did not violate the Eighth Amendment under *Lockett* and *Eddings*, it did violate due process under *Gardner*. *Id.* at 9, 106 S.Ct. at 1673 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment).

Were *Gardner* and *Skipper* the totality of the "legal landscape" in 1988, the claim that *Simmons* was not a new rule might, at least at first blush, have considerable force.

Of critical significance, however, in addition to *Gardner* and *Skipper*, a reasonable jurist in 1988 would also have confronted *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), in which the Court not

only held that a defendant was *not* constitutionally entitled to apprise the jury of the Governor's power to commute a death sentence (when the trial court had already instructed the jury of the Governor's power to commute a life sentence without parole), but also expressly noted with approval the practices in many states of forbidding any reference to the possibility of pardon, commutation, or parole.

In *Ramos*, the Court upheld the constitutionality of a death sentence under the Eighth and Fourteenth Amendments,⁴ where the jury had been instructed, as required by state statute, that the Governor possessed the power to commute a sentence of life imprisonment without possibility of parole. Justice O'Connor, writing for the Court, repeatedly emphasized that, with only a few exceptions,

⁴ To be sure, the Court's decision in *Ramos* rested primarily on the Eighth Amendment. But the Court specifically considered, *inter alia*, whether the Briggs Instruction ran afoul of the due process concerns of reliability in sentencing that were identified in *Gardner*, concluding that *Gardner* "provid[ed] no support for respondent." 463 U.S. at 1004, 103 S.Ct. at 3455. Indeed, it concluded its opinion by reiterating its earlier determinations that the instruction "[did] not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process," *id.* at 1013, 103 S.Ct. at 3460, including those identified in *Gardner*, *see id.* at 1000-01, 103 S.Ct. at 3452-53.

Regardless, it was apparent in 1988, as it is still today, that the Eighth Amendment's principles inform the Due Process capital sentencing inquiry. Therefore, a reasonable jurist could hardly be faulted either for resorting to both lines of the Court's cases, as the Court itself has repeatedly done, or for relying only on the line directly implicated in the case before him.

"the Court has deferred to the State's choice of substantive factors relevant to the penalty determination." *Id.* at 1001, 103 S.Ct. at 3453. The Court invoked *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), to make the point, noting that "the joint opinion [in *Gregg*] did not undertake to dictate to the State the particular substantive factors that should be deemed relevant to the capital sentencing decision," *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3452 (emphasis in original), and then quoting *Gregg's* observation that the guidance that should be given the jury in making its sentencing determination is that " 'that the State, representing organized society, deems particularly relevant to the sentencing decision,' " *id.* at 1000, 103 S.Ct. at 3453 (quoting *Gregg*, 428 U.S. at 192, 96 S.Ct. at 2934) (emphasis added by *Ramos* Court).

Importantly, the Court in *Ramos* also squarely rejected an argument by petitioner that was virtually indistinguishable in principle from that made by petitioner in *Simmons*. *Ramos* argued that an instruction as to the Governor's power to commute a death sentence was required under "basic principles of fairness," because, otherwise, the court's instruction that the Governor could commute a life sentence, "create[d] the misleading impression that the jury can prevent the defendant's return to society only by imposing the death sentence," *id.* at 1010-11, 103 S.Ct. at 3458-59, just as *Simmons* argued that an instruction to the jury as to his parole ineligibility was required to eliminate the mistaken impression that only by imposing death could the jury prevent his return into society. As the Court explained petitioner's argument in *Simmons*:

Petitioner argued that, in view of the public's misunderstanding about the meaning of "life

imprisonment" in South Carolina, there was a reasonable likelihood that the jurors would vote for death simply because they believed, mistakenly, that petitioner eventually would be released on parole.

512 U.S. at ___, 114 S.Ct. at 2191. Notwithstanding, the Court dismissed *Ramos's* argument on the ground, *inter alia*, that the entire instruction "satisfies the *Jurek* [v. *Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976),] requirement that '[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.' " *Ramos*, 463 U.S. at 1012 n. 29, 103 S.Ct. at 3459 n. 29 (quoting *Jurek*, 428 U.S. at 276, 96 S.Ct. at 2958) (emphasis added). Justice Marshall in dissent in *Ramos* even criticized the majority's rejection of this instruction on precisely the same grounds that the *Simmons* Court ultimately employed in requiring an instruction as to parole ineligibility:

The Briggs Instruction may well mislead the jury into believing that it can eliminate any possibility of commutation by imposing the death sentence. It indicates that the Governor can commute a life sentence without possibility of parole, but not that the Governor can also commute a death sentence. The instruction thus erroneously suggests to the jury that a death sentence will assure the defendant's permanent removal from society whereas the alternative sentence will not.

Presented with this choice, a jury may impose the death sentence to prevent the Governor from exercising his power to commute a life sentence without possibility of parole.

Ramos, 463 U.S. at 1016, 103 S.Ct. at 3461 (Marshall, J., dissenting) (citations and footnote omitted, emphasis added). Compare *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2193 ("In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration.").⁵

⁵ Indeed, one federal district court rejected a pre-*Simmons* claim very much like that in *Simmons* on precisely this ground:

While *Ramos* did not address the precise issue raised here, it is instructive. . . . The Briggs Instruction [reviewed in *Ramos*] informed the jury that a sentence of life imprisonment without parole may be commuted by the governor to a sentence that includes the possibility of parole. The jury in *Ramos* was not told that the governor could similarly commute a sentence of death to a lesser punishment. The California Supreme Court reversed the death sentence, in part because this combination of instructions allowed the jury to believe mistakenly that the "only way to keep the defendant off the streets is to condemn him to death." The instructions given . . . [here] could also produce this misapprehension in jurors: telling the jury that the alternative to death is imprisonment might lead it to believe that public safety would be assured only through the imposition of the death penalty. Despite this concern, the Supreme Court upheld the constitutionality of the Briggs Instruction in *Ramos*, finding that it did not preclude individualized sentencing determination or introduce a speculative element in jury deliberation. . . . In light of *Ramos*, [petitioner's] appeal to the general principle that imposition of capital punishment must be based on

Although the *Ramos* Court noted that it considered it desirable for the jury to have this information concerning the Governor's power to commute a death sentence, and as much other information as possible during sentencing, 463 U.S. at 1009 n. 23, 103 S.Ct. at 3458 n. 23, it nevertheless found that the trial court's refusal to inform the jury of the Governor's power to commute the death sentence (while at the same time informing it of his power to commute life imprisonment) was in no way unconstitutional, *see id.* at 1013, 103 S.Ct. at 3460 ("[The State's] failure to inform the jury also of the Governor's power to commute a death sentence does not render it constitutionally infirm.").

No doubt, a reasonable jurist in 1988, considering whether the Constitution necessarily required the rule of *Simmons*, would also have focused immediately upon the broad principles of deference to state decisions regarding the substantive factors that juries may consider during sentencing, which underlay the Court's decision to uphold California's choice to inform the jury of the Governor's power to commute a life sentence but not his power to commute a death sentence. In punctuation of this principle, the Court concluded its entire opinion as follows:

reason, rather than emotion and caprice, is an insufficient basis on which to grant relief. All constitutional rules can be stated in very general terms, but general principles do not compel specific rules.

Albanese v. McGinnis, 823 F.Supp. 521, 565-66 (N.D.Ill.1993) (citations and footnote omitted), *aff'd* 19 F.3d 21 (7th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1114, 130 L.Ed.2d 1078 (1995).

In sum, the Briggs Instruction does not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process. It does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation. Finally, its failure to inform the jury also of the Governor's power to commute a death sentence does not render it constitutionally infirm. *Therefore, we defer to the State's identification of the Governor's power to commute a life sentence as a substantive factor to be presented for the sentencing jury's consideration.*

Our conclusion is *not intended to override the contrary judgment of state legislatures that capital sentencing juries in their States should not be permitted to consider the Governor's power to commute a sentence. . . . We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the States.*

Id. at 1013-14, 103 S.Ct. at 3459-60 (footnote omitted) (emphasis added).

Even more so, that jurist would have fixed immediately upon footnote 30 within this concluding passage. As Justice O'Connor, the author of *Ramos* and the necessary fifth vote in *Simmons*, observed in *Simmons* itself, see 512 U.S. at ___, 114 S.Ct. at 2200 (O'Connor, J., concurring in the judgment) (emphasis added), *Ramos* "noted with approval" that,

[m]any state courts have held it improper for the jury to consider or to be informed – through

argument or instruction – of the possibility of commutation, pardon, or parole.

Ramos, 463 U.S. at 1013 n. 30, 103 S.Ct. at 3460 n. 30 (emphasis added). In that footnote passage in *Ramos*, the Court even cited "with approval" a Georgia statute "prohibiting argument as to the possibility of pardon, parole, or clemency," and numerous state cases holding, for example, that "'[a]ny consideration of the possibility of parole as such simply is irrelevant,'" and that "consideration of parole [is] outside [the] proper scope of jury's duty as fixed by statute." *Id.*

In fact, not only the majority, but the full Court, recognized and approved, as constitutionally permissible, the practice of "nearly every jurisdiction which has considered the question" of not "permitt[ing] [juries] to consider commutation and parole." *Id.* at 1025, 103 S.Ct. at 3466 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.) (emphasis added); see also *id.* at 1029, 103 S.Ct. at 3468 (Stevens, J., dissenting). The dispute between the majority and the dissenters was whether the States could ever allow the jury to consider matters such as commutation, pardons or parole. The majority concluded that the decision to allow jury consideration of these matters should be left to the discretion of the States, but the dissenters went even further, arguing that States should never be allowed to permit instruction or argument to the jury concerning commutation, pardon, or parole:

The [Briggs] [I]nstruction invites juries to impose the death sentence to eliminate the possibility of eventual release through commutation and parole. Yet that possibility bears no relation

to the defendant's character or the nature of the crime, or to any generally accepted justification for the death penalty. . . . In my view, the Constitution forbids the jury to consider any factor which bears no relation to the defendant's character or the nature of his crime, or which is unrelated to any penological objective that can justify imposition of the death penalty. Our cases establish that a capital sentencing proceeding should focus on the nature of the criminal act and the character of the offender. . . . Considerations such as the extent of premeditation, the nature of the crime, and any prior criminal activity have been considered relevant to the determination of the appropriate sentence. . . . [T]he mere possibility of a commutation "is wholly and utterly foreign to" the defendant's guilt and "not even remotely related to" his blameworthiness. That possibility bears absolutely no relation to the nature of the offense or the character of the individual. . . . The possibility of commutation has no relationship to the state purposes that this Court has said can justify the death penalty.

Id. at 1021-23, 103 S.Ct. at 3464-65 (Marshall, J., dissenting) (emphasis added, footnotes and citations omitted).

Looking to the actual practice in the several states as support for his argument, Justice Marshall continued:

The propriety of allowing a sentencing jury to consider the power of a Governor to commute a sentence or of a parole board to grant parole has been considered in 28 jurisdictions in addition to California. Of those jurisdictions, 25 have concluded, as did the California Supreme Court in this case, that the jury should not consider the possibility of pardon, parole, or commutation.

Id. at 1026, 103 S.Ct. at 3466 (emphasis added, footnotes omitted). And, as support for the proposition that "in those States which formerly permitted jury consideration of parole and commutation the trend has been to renounce the prior decisions," Justice Marshall cited the very same Georgia statute cited by the majority in footnote 30 as "forbidding any jury argument concerning commutation or parole." *Id.* at 1027 & n. 16, 103 S.Ct. at 3467 & n. 16 (referencing Ga.Code Ann. s 27-2206 (1972), the precursor to Ga.Code Ann. 17-8-76) (emphasis added). Even more strikingly, Justice Marshall cited *Clanton v. Commonwealth*, 223 Va. 41, 286 S.E.2d 172 (1982), which affirmed a trial court's refusal to answer the jury's question as to whether the capital defendant would be eligible for parole and which reaffirmed *Hinton v. Commonwealth*, 219 Va. 492, 247 S.E.2d 704 (1978), and *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980), both of which were expressly relied upon by the trial court below to deny O'Dell's request that he be allowed to argue parole ineligibility to the jury, J.A. at 2378-79, 2382-85. See *Ramos*, 463 U.S. at 1026 n. 13, 103 S.Ct. at 3466 n. 13 (Marshall, J., dissenting); see also *id.* (citing *Summers v. State*, 86 Nev. 210, 467 P.2d 98, 100 (1970) ("reaffirming *Serrano v. State*, 84 Nev. 676, 447 P.2d 497 (1968), which instructed [the] jury to assume that life without parole means exactly that") (parenthetical from *Ramos*, emphasis added)).⁶

⁶ Justice Marshall was relying primarily, although not exclusively, on the Eighth Amendment for his conclusion that the Constitution forbids any reference to the possibility of parole. It was, however, at the very least reasonable for state

In hindsight, and particularly in the wake of *Simmons*, it might be suggested that the Court in *Ramos* was expressing approval only of those state laws forbidding reference to the affirmative possibility of parole, and not of those prohibiting reference to the legal impossibility of parole, although to our knowledge that has never been suggested, and petitioner does not do so here. We believe, however, that, even with the Court's observation that "States are free to provide greater protections in their criminal justice system than the Federal Constitution requires," 463 U.S. at 1013-14, 103 S.Ct. at 3460, such a suggestion would border on the disingenuous, considering that the very state sentencing law that the Court was reviewing in *Ramos*, like numerous other states' laws then in effect and of which the Court was aware,⁷ provided for

jurists to have concluded that the Due Process Clause did not require what Justice Marshall believed the Eighth Amendment forbade, particularly given the majority's position that such matters are properly committed to the discretion of the individual states.

⁷ See, e.g., Ala.Code § 13A-5-46(e); Ark.Code Ann. 5-4-603(b); Cal. Pen.Code § 190.3; Conn. Gen.Stat. § 53a-46a(f); Del.Code Ann. tit. 11, § 4209(a); La.Code Crim. Proc. Ann. art. 905.6; Mo. Ann. Stat. § 565.030.4; N.H.Rev.Stat. Ann. § 630:5(IV); Pa. Stat. Ann. tit. 61, § 331.21; Va.Code § 53.1-151(B1); Wash. Rev.Code Ann. § 10.95.030(1). The Court had been aware of similar laws for at least a decade. See *Schick v. Reed*, 419 U.S. 256, 267 & n. 7, 95 S.Ct. 379, 385 & n. 7, 42 L.Ed.2d 430 (1974) (noting that " 'no-parole' condition attached to the commutation of [petitioner's] death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole" and citing 21 U.S.C. § 848(c); Mass. Gen. Laws Ann., c. 265, § 2 (1970); and Nev.Rev.Stat., Tit. 16, c. 200.030, § 6, c. 200.363, § 1(a) (1973)).

"life without possibility of parole" as the only alternative to death, *id.* at 994-95, 103 S.Ct. at 3449-50, and the Court nonetheless chose the broad, categorical language that it did, without even a hint that it intended such a distinction. Indeed, Justice O'Connor's concurrence in the *Simmons* judgment, "despite [the Court's] general deference to state decisions regarding what the jury should be told about sentencing," 512 U.S. at ___, 114 S.Ct. at 2201 (emphasis added) – an explicit reference to her opinion for the Court in *Ramos* and to the discussion at pages 1013-14 and n. 30, 103 S.Ct. at page 3460 and n. 30 in particular, *see id.* at ___, 114 S.Ct. at 2200 – all but confirms that the Court intended no such distinction in *Ramos*. And, of course, the reasoning of the *Ramos* dissent – that the jury should be forbidden from considering anything beyond the particular defendant's character and his crime – which Justice Blackmun, the author of the plurality in *Simmons*, expressly joined, would not even admit such a distinction.

The question, in any event, is not whether in fact the Court in this passage was limiting its approval to those state laws prohibiting reference to the possibility that the defendant might become parole eligible. The only question is whether it would have been objectively unreasonable for jurists not to read the passage as so limited. It would be the height of pedanticism to suggest that *it would have been objectively unreasonable* for the 1988 jurist to have understood the passage as extending to all state laws prohibiting comment on parole, including those prohibiting comment as to parole ineligibility. Both the majority's and the dissent's language unquestionably swept broadly, suggesting no distinction whatsoever.

And *Ramos*' holding that the State of California was not constitutionally required to inform the jury that the Governor could also commute a death sentence, in the face of petitioner's argument that not to do so left the jury with the belief that it could prevent his return to society only by sentencing him to death, would have been analytically indefensible had the Court there drawn such a distinction. Even in *Simmons*, which ultimately constitutionalized this very distinction, not a single Justice so much as suggested that the distinction had actually been drawn in *Ramos*, ten years earlier. Under these circumstances, to suggest now that the distinction was made then, and that the several states were objectively unreasonable in not divining it at the time, would be not only demoralizing to the state and lower courts, but also destructive of the principles of comity and finality that inspired the "new rule" doctrine to begin with.

Finally, although the Supreme Court itself seemed to consider *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), wholly irrelevant to the question decided in *Simmons*,⁸ the reasonable jurist in 1988

⁸ The Court did not so much as cite *Caldwell* in *Simmons*, foreclosing any argument (which O'Dell does not make, in any event) that *Caldwell* somehow compelled the result in *Simmons*. Presumably, *Simmons* did not neglect *Caldwell* merely because that case was decided under the Eighth Amendment, considering the Court's liberal reliance upon Eighth Amendment cases elsewhere in the *Simmons* opinions and its routine cross-pollenization between its Eighth Amendment and its Due Process lines of cases in the capital sentencing context. Almost certainly, the Court avoided relying on *Caldwell* because it considered that case as limited to the affirmative provision of inaccurate information as to the proper role of the jury, as the

would have at least perused that case as well. In *Caldwell*, the prosecutor had argued to the jury that it would not be finally responsible for the imposition of a death penalty because its decision would automatically be reviewed by the state's Supreme Court. The Mississippi Supreme Court rejected *Caldwell*'s claim that such an argument violated the Eighth Amendment, concluding that, "[b]y [*Ramos*'] reasoning, states may decide whether it is error to mention to jurors the matter of appellate review." *Id.* at 326, 105 S.Ct. at 2637 (quoting *Caldwell v. State*, 443 So.2d 806, 813 (Miss.1983)). The Supreme Court reversed, with a plurality of the Court characterizing as "too broad a view of *Ramos*" Mississippi's reading of that case as

Court had expressly held in 1986. *Darden v. Wainwright*, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 2472 n. 15, 91 L.Ed.2d 144 (1986); see *infra* note 9; see also *Sawyer*, 497 U.S. at 233, 110 S.Ct. at 2826 (describing *Caldwell* as having held that "the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere"); *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989) ("[I]f the challenged instructions accurately described the role of the jury under state law, there is no basis for a *Caldwell* claim. To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."). As the Chief Justice concluded for the Court in *Romano v. Oklahoma*, 512 U.S. 1, ___, 114 S.Ct. 2004, 2010, 129 L.Ed.2d 1 (1994):

The infirmity identified in *Caldwell* is simply absent in this case: Here the jury was not affirmatively misled regarding its role in the sentencing process. The evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury's role in the sentencing process.

"[holding] that States are free to expose capital sentencing juries to any information and argument concerning postsentencing procedures." 472 U.S. at 335, 105 S.Ct. at 2643. Rather, the plurality explained, the Court upheld the instruction in *Ramos* because it was accurate and relevant to a legitimate penological objective. *Id.* And on this basis, the *Caldwell* plurality distinguished the prosecutor's argument there before it:

In contrast [to the instruction in *Ramos*], the argument at issue here cannot be said to be either accurate or relevant to a valid penological interest. The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform. Similarly, the prosecutor's argument is not linked to any arguably valid sentencing consideration.

Id. at 336, 105 S.Ct. at 2643.

Significantly, Justice O'Connor joined the judgment and the opinion of the Court, *except that part in which Justice Marshall, in what consequently was only a plurality, discussed Ramos and the appropriateness of states allowing their juries to consider matters such as postsentencing appellate review.* *Id.* at 341, 105 S.Ct. at 2646 (O'Connor, J., concurring in part and concurring in the judgment). While Justice O'Connor agreed with the plurality that the prosecutor's argument was inaccurate and misleading, and therefore violative of the Eighth Amendment, she disagreed with the plurality's conclusion regarding the complete irrelevancy to the sentencing decision of information concerning appellate review. Justice Marshall had

observed for the plurality, adopting the same position that he had articulated in dissent in *Ramos*, that the availability of appellate review "is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence." *Id.* at 336, 105 S.Ct. at 2643. But Justice O'Connor's opinion, which, as the Court held in *Romano*, 512 U.S. at ___, 114 S.Ct. at 2010, "is controlling" under *Marks*, defended her majority position in *Ramos* and reaffirmed that the Constitution does not prohibit a jury from receiving *accurate* information as to state post-sentencing law:

The Court correctly observes that *Ramos* does not imply that "States are free to expose capital sentencing juries to *any* information and argument concerning post-sentencing procedures" no matter how inaccurate. Certainly, a misleading picture of the jury's role is not sanctioned by *Ramos*. But neither does *Ramos* suggest that the Federal Constitution prohibits the giving of accurate instructions regarding post-sentencing procedures.

Caldwell, 472 U.S. at 342, 105 S.Ct. at 2646 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted; emphasis added).

And critically as it bears on whether *Simmons* was required in the face of *Ramos*, Justice O'Connor specifically addressed herself to the "inaccuracy and unreliability" that results not from *affirmatively* providing false information, but merely from the *failure to disabuse* jurors of every misconception they might have about the

state's post-sentencing processes – the very kind of “inaccuracy and unreliability” that the Court eventually held required the rule in *Simmons*:

Jurors may harbor misconceptions about the power of state appellate courts or, for that matter, *this* Court to override a jury's sentence of death. Should a State conclude that the reliability of its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review, I see nothing in *Ramos* to foreclose a policy choice in favor of jury education.

Caldwell, 472 U.S. at 342, 105 S.Ct. at 2646. Compare *Simmons*, 512 U.S. at ___ ___, 114 S.Ct. at 2191, 2193. Of course, saying that the states may choose, as a matter of policy, to attempt to eliminate any pre-existing juror misconceptions about post-sentencing procedures is necessarily to say that they are not constitutionally required to do so.

In sum, *Caldwell* would have appeared to the reasonable jurist as simply another chapter in the continuing debate on the Court over the extent to which states should be allowed discretion over whether to inform their juries of state post-sentencing laws and procedures – a chapter in which the Court, per Justice O'Connor, reconfirmed the broad discretion retained by the states over whether to apprise juries of state post-sentencing laws. In *Ramos*, for five Members of the Court, and again

in *Caldwell* for four, but effectively five,⁹ Justice O'Connor concluded that the states should be afforded the widest possible discretion; and in *Ramos*, and again in *Caldwell*, Justice Marshall argued for four Members of the Court that they should be allowed none at all. But both sides of the Court agreed, in both *Ramos* and *Caldwell*, that should the states choose to provide information as to post-sentencing laws and procedures, they cannot affirmatively mislead the jury as to those laws and procedures.

C.

A reasonable jurist in 1988, thus, would have found himself in something of a quandary. Footnote one of *Skipper*, in combination with the plurality opinion in *Gardner*, at least suggested that due process might compel the rule in *Simmons*. However, the holding, reasoning, and express language of *Ramos*, and in particular the text at and of footnote 30, seemed to render it all but a certainty that the rule of *Simmons* was not only not compelled, but forbidden – a conclusion only reinforced by the *Ramos* dissenters and by *Caldwell*. As even the *Simmons* plurality recognized, the “States that do not provide

⁹ Justice Powell took no part in the consideration of *Caldwell*, so it might appear that only the three *Caldwell* dissenters agreed with Justice O'Connor. However, Justice Powell joined Justice O'Connor's majority opinion in *Ramos*, and, as he said for the majority in *Darden v. Wainwright*, decided only one year after *Caldwell*, “*Caldwell* is relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.” 477 U.S. at 183 n. 15, 106 S.Ct. at 2472 n. 15.

capital-sentencing juries with any information regarding parole ineligibility seem to rely . . . on the proposition that *Ramos* held that such determinations are purely matters of state law." *Simmons*, 512 U.S. at ___ & n. 8, 114 S.Ct. at 2195-96 & n. 8 (citing the decision of the Virginia Supreme Court on O'Dell's direct appeal).

1.

Since the reasonable state or federal lower court jurist was not at liberty to ignore either *Gardner/Skipper* or *Ramos/Caldwell*, and since the Supreme Court apparently viewed these cases as all compatible – it having not overruled *Gardner* in *Ramos* or *Caldwell*, nor *Ramos* and *Caldwell* in *Skipper* – that jurist would have been obliged to reconcile these cases by finding some “meaningful[] distin[ction]” between them, see *Wright*, 505 U.S. at 304, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment). Upon examining the cases, an entirely reasonable distinction would have suggested itself – a distinction of *Gardner* and *Skipper*, on the one hand, from *Ramos* and *Caldwell* on the other, much like the distinction the Court drew in *Saffle* between the rule of *Lockett* and *Eddings* (the key precedents underlying *Skipper*), and the rule that Parks was there urging. In *Saffle*, the Court concluded that *Lockett* and *Eddings* “place clear limits on the ability of the State to define the *factual* bases upon which the capital sentencing decision must be made.” *Saffle*, 494 U.S. at 490, 110 S.Ct. at 1261 (emphasis added) (citing *Skipper*, with the following parenthetical: “exclusion of evidence regarding defendant’s post-offense conduct” (emphasis added)). The Court then contrasted that rule

with petitioner’s proposed rule that states could not constitutionally prohibit juries from sentencing based upon sympathy and empathy:

Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence. There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision. We thus cannot say that the large majority of federal and state courts that have rejected challenges to anti-sympathy instructions similar to that given at Parks’ trial have been unreasonable in concluding that the instructions do not violate the rule of *Lockett* and *Eddings*.

Id.

As *Saffle* distinguished between *Lockett*’s and *Eddings*’ rule as to *what* mitigating evidence the jury may consider, from Park’s proposed rule as to *how* the jury may consider that evidence, so also a jurist in 1988 could reasonably have distinguished *Gardner*’s and *Skipper*’s rule as to the defendant’s right to rebut prosecution claims with *factual* evidence, from *Ramos*’ rule (and *Simmons*’ rule) as to the defendant’s right to rebut prosecution claims with arguments from state law.

That is, a reasonable jurist could have concluded that the due process principle of *Gardner* and *Skipper* was that a trial court could not deny a capital defendant the opportunity to rebut arguments made by the State with

relevant *factual evidence* about himself, his character, and his particular offense. Thus, the Court required the secret presentence report in *Gardner*, which provided "factual information" upon which the judge relied in sentencing Gardner to death, *Gardner*, 430 U.S. at 353, 97 S.Ct. at 1202 (plurality); *id.* at 364, 97 S.Ct. at 1208 (White, J., concurring in the judgment) ("secret information relevant to the 'character and record of the individual offender'"), be made known to the defendant so that he could attempt to rebut it with contrary "factual information." See also *id.* at 360, 97 S.Ct. at 1205 (plurality) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us . . . to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." (emphasis added)). And, thus, the prosecution's argument in *Skipper* that the defendant would pose a future danger and would "likely rape other prisoners," *Skipper*, 476 U.S. at 3, 106 S.Ct. at 1670, necessitated that the defendant be allowed to rebut this argument with evidence of his "past conduct," *id.* at 5, 106 S.Ct. at 1671, namely good behavior while previously incarcerated. As the Court emphasized at the outset of its opinion in *Skipper*,

[t]here is no disputing that this Court's decision in *Eddings* requires that in capital cases " 'the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death.' " Equally clear is the corollary rule that the sentencer may

not refuse to consider or be precluded from considering "any relevant mitigating evidence."

Id. at 4, 106 S.Ct. at 1670-71 (citations omitted, emphasis added).¹⁰

In contrast, that 1988 jurist could have and, indeed, would have most reasonably understood *Ramos*, as apparently almost every jurist in fact did, as setting forth the principle that whether to instruct juries on state law – like the governor's power to commute a sentence or the parole board's power to parole a prisoner – is a decision left to the "wisdom of . . . the States" by the Constitution. *Ramos*, 463 U.S. at 1014, 103 S.Ct. at 3460; see also *id.* at 1013 & n. 30, 103 S.Ct. at 3460 & n. 13. The Court itself seems to have understood *Ramos* this way when it held in 1990 in *Sawyer* that its decision in *Caldwell* was a new rule under *Teague*. As the Court said there, although the Mississippi Supreme Court's 1983 holding "without dissent . . . that *Ramos* stood for the proposition that 'states may decide whether it is error to mention to jurors the matter of appellate review,' " may in retrospect have proven to be incorrect to the limited extent that it failed to recognize that a state may not provide inaccurate or misleading information even about post-sentencing procedures, it was nonetheless a reasonable conclusion at the time.

¹⁰ At this juncture in *Skipper*, the Court was discussing the requirements of the Eighth Amendment, not those of the Due Process Clause. However, the most natural implication would be that the rebuttal evidence that the defendant must be allowed to introduce under the Due Process Clause would be the same as that which the Court held he must be allowed to introduce under the Eighth Amendment – evidence concerning his character and offense.

497 U.S. at 237, 110 S.Ct. at 2828 (quoting *Caldwell v. State*, 443 So.2d 806 (Miss.1983)). And, of course, nothing in *Caldwell* called into question (indeed, as noted, that case only confirmed) *Ramos*' deference to the states on whether to instruct juries as to state post-sentencing laws, provided that any information the states choose affirmatively to provide is accurate. As Justice O'Connor explained:

The Court today, relying in part on my opinion in *Caldwell v. Mississippi*, rejects petitioner's claim that the introduction of evidence of a prior death sentence impermissibly undermined the jury's sense of responsibility. I write separately to explain why in my view petitioner's *Caldwell* claim fails. The inaccuracy of the prosecutor's argument in *Caldwell* was essential to my conclusion that the argument was unconstitutional. An accurate description of the jury's role – even one that lessened the jury's sense of responsibility – would have been constitutional. [*Caldwell*, 472 U.S. at 342, 105 S.Ct. at 2646] ("a misleading picture of the jury's role is not sanctioned by [*California v. Ramos*], [b]ut neither does *Ramos* suggest that the federal Constitution prohibits the giving of accurate instructions regarding post-sentencing procedures").

Romano, 512 U.S. at ___, 114 S.Ct. at 2013 (O'Connor, J., concurring).

2.

Indeed, this very distinction between facts and legal power to subsequently modify sentences was suggested by Justice O'Connor in *Simmons* itself:

Unlike in *Skipper*, where the defendant sought to introduce *factual evidence* tending to disprove the State's showing of future dangerousness, petitioner [here] sought to rely on the operation of *South Carolina's sentencing law* in arguing that he would not pose a threat to the community if he were sentenced to life imprisonment.

Simmons, 512 U.S. at ___, 114 S.Ct. at 2200 (O'Connor, J., concurring in the judgment) (emphasis added). Even Jonathan Dale Simmons himself drew this distinction in arguing for the rule of *Simmons*. See Petitioner's Br., *Simmons v. South Carolina*, No. 92-9059 (1994), at *35 ("*Skipper* concerned the exclusion of evidence, rather than the withholding of accurate legal information from the jury.>").

And, at the very least, this was a reasonable distinction in 1988, considering also that relevant factual information, like secret sentencing reports or prior good behavior, cannot change with time, but a state's legal standards and post-conviction procedures, like eligibility for commutation or parole, can always change long after the sentencing jury renders its verdict. Cf. *Ramos*, 463 U.S. at 1020, 103 S.Ct. at 3463 (Marshall, J., dissenting) ("To invite the jury to indulge in such speculation is to ask it to foretell numerous imponderables: *the policies that may be adopted by unnamed future Governors and parole officials, . . . as well as any other factors that might be deemed relevant to the commutation and parole decisions. Yet these are questions that 'no human mind can answer. . . because they rest on future events which are unpredictable.'*" (emphases added)). But see *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2195. Moreover, this was a distinction that followed directly from the Court's holding in

Jurek, which was reaffirmed in *Ramos*, that, under the Eighth Amendment, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek*, 428 U.S. at 276, 96 S.Ct. at 2958 (emphasis added); see also *Ramos*, 463 U.S. at 1006, 1012 n. 29, 103 S.Ct. at 3456, 3459 n. 29. And it was factual evidence about the Eighth Amendment factors relevant to the individual defendant which *Gardner* and *Skipper* had held defendants had a due process right to introduce in rebuttal of prosecution arguments concerning these factors. Not until *Simmons* itself had the Court ever held that there was a due process right to rebut prosecution arguments with evidence unrelated to the defendant's character and crime. Cf. *Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828 ("It is beyond question that no case prior to *Caldwell* invalidated a prosecutorial argument as impermissible under the Eighth Amendment.").

That the Supreme Court in *Simmons* ultimately resolved any tension between the *Gardner/Skipper* right to rebut state arguments with factual evidence, and *Ramos*' pronouncement that the states are owed deference as to whether to instruct their juries on the implications of state laws governing the powers of commutation and parole, and that it resolved that tension by permitting argument based upon state law in the narrow circumstance of capital cases where future dangerousness is argued and the defendant is parole ineligible, is, of course, not determinative of the new rule inquiry. The question is not whether the distinction between arguments from factual evidence concerning the defendant's character and offense and arguments from state law itself

was necessarily correct, or whether it was ultimately accepted by the Court as dispositive; rather, the only question is whether it would have been objectively unreasonable for a jurist in 1988 – forced to grapple with and reconcile *Gardner*, *Skipper*, *Ramos*, and *Caldwell* – to have drawn this distinction, and therefore to have concluded that the rule in *Simmons* was not compelled. See *Wright*, 505 U.S. at 304, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment) ("To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final."). The answer to this latter question is most assuredly "no." In no sense would this have been an "illogical or even a grudging application," *Butler*, 494 U.S. at 415, 110 S.Ct. at 1217, of these cases, as evidenced by the fact that Justice O'Connor recognized the very same distinction in her opinion in *Simmons*.

Even the *Simmons* plurality seems to have acknowledged as much. After noting that "[t]he few states that do not provide capital-sentencing juries with any information regarding parole ineligibility seem to rely . . . on the proposition that *California v. Ramos* held that such determinations are purely matters of state law," *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2195-96, the plurality implicitly validated the reasonableness of this reliance, conceding that "[i]t is true that *Ramos* stands for the broad proposition that [the Court] generally will defer to a State's determination as to what a jury should and should not be told about sentencing," a proposition with which the full Court agreed, *id.*; see also *id.* at ___, 114 S.Ct. at 2200

(O'Connor, J., concurring in the judgment) ("The decision whether or not to inform the jury of the possibility of early release is generally left to the States."). In other words, the Court itself seemed to understand that it had chosen to recognize in *Simmons* yet another exception to what was (and is still today) indisputably its general rule of deference to the states on whether to inform their juries of state law governing such matters as commutation and parole. See, e.g., *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2201 (O'Connor, J., concurring in the judgment) ("[D]espite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires . . ."); see also *Johnson v. Scott*, 68 F.3d 106, 111 n. 11 (5th Cir.1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1358, 134 L.Ed.2d 525 (1996).¹¹

In holding that *Simmons* announced a new rule, we recognize that Justice Blackmun stated in his opinion in *Simmons* that "[t]he trial court's refusal to apprise the jury of information crucial to its sentencing determination . . . cannot be reconciled with our well-established precedents interpreting the Due Process Clause," and that "[t]he principle announced in *Gardner* [and] reaffirmed in

¹¹ As the Fifth Circuit explained in *Johnson*,

Simmons . . . announce[d] a new rule because it held that in some situations the states are no longer free to decide whether an instruction on parole should be given. This is inconsistent with the Court's earlier ruling in *California v. Ramos*. In *Ramos*, the Court held, *inter alia*, that whether or not an instruction on post-sentencing contingencies was appropriate remained properly in the hands of the states.

68 F.3d at 111 n.11 (emphasis added).

Skipper . . . compels" this conclusion. *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2194 (Blackmun, J.) (emphasis added). However, not only is this *dicta*, it is merely that of a plurality of the Court. Notably, Justice O'Connor's concurrence in the judgment, joined by the Chief Justice and Justice Kennedy, and necessary for the *Simmons* majority, avoids any suggestion that the Court's decision was "compelled" by prior caselaw. In any event, the Court itself has admonished that categorical language about the degree to which a decision on the merits is controlled by prior decisions does not determine whether that decision was compelled for new rule purposes. See, e.g., *Butler*, 494 U.S. at 415, 110 S.Ct. at 1217. As the Court stated in *Butler*:

[T]he fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts.

Id. We do not ascribe any particular significance to the fact that Justice Blackmun used the word "compels" in *Simmons*, instead of "controlled" or "within the logical compass of," as used by the Court in *Butler*. The point of the *Butler* passage, as we understand it, is that the hortatory *dicta* used in opinions to underscore their faithfulness to precedent should not be considered binding upon the separate question of whether they announced a new rule under *Teague*. Cf. *Penry*, 492 U.S. at 353, 109 S.Ct. at

2965 (Scalia, J., dissenting) ("In a system based on precedent and stare decisis, it is the tradition to find each decision 'inherent' in earlier cases. . . .").

D.

Our conclusion that the determination in 1988 that the Constitution did not require O'Dell be allowed to argue parole ineligibility was a "reasonable, good-faith interpretation[] of existing precedents," *Butler*, 494 U.S. at 414, 110 S.Ct. at 1217, is "confirmed by the experience of the lower courts." *Caspari*, 510 U.S. at 393, 114 S.Ct. at 955.

As Justice Kennedy noted for the Court in *Sawyer*, "[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." 497 U.S. at 241, 110 S.Ct. at 2831. Because "[c]onstitutional error is not the exclusive province of the federal courts, . . . in the *Teague* analysis the reasonable views of state courts are entitled to consideration along with those of federal courts." *Caspari*, 510 U.S. at 395, 114 S.Ct. at 956. In 1988, the Virginia Supreme Court, which, "as a state court, is the primary beneficiary of the *Teague* doctrine," *Stringer*, 503 U.S. at 237, 112 S.Ct. at 1140, had repeatedly held that "it [is] the jury's duty to assess the penalty, irrespective of considerations of parole." *Poyner*, 329 S.E.2d at 828; see also *Stamper*, 257 S.E.2d at 821 (expressly relied upon by the trial court in denying O'Dell's request, J.A. at 2378-79); *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361, 368 (1987) ("A reduced sentence is not the

responsibility of the judiciary but of the executive department, and argument as to what that department might do encroaches upon the separation of their functions."), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483, 487-88, *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988) (rejecting petitioner's argument that, under *Skipper* and *Ramos*, he should be entitled to present evidence on parole eligibility). Of course, the Virginia Supreme Court's decision on direct appeal in this case – an "especially valuable" opinion because it "concern[s] the legal implications of precisely the same set of facts [and so] is the closest one can get to a 'case on point,'" *Wright*, 505 U.S. at 305, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment) – concluded as well, relying on the long line of Virginia precedent, that the defendant should not be able to argue parole eligibility. *O'Dell*, 364 S.E.2d at 507. And, from 1988 until *Simmons*, the Virginia Supreme Court continued to rely on *Ramos* in denying parole-ineligible defendants the right to argue their parole ineligibility to capital sentencing juries. As the Court elaborated in *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380, 394 (1992) (emphasis added), *cert. denied*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993),

Mueller argues that the trial court violated his due process rights by refusing to instruct the jury that, pursuant to Code § 53.1-151(B1), he would not be eligible for parole. . . . We hold that the trial court did not err in its rulings here. This Court has held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration. Further, the United States Supreme Court has expressly

left the determination of this question to the individual states as a matter of state law. *California v. Ramos*, 463 U.S. 992, 1013-14, 103 S.Ct. 3446, 3460, 77 L.Ed.2d 1171 (1983).

Although likewise not necessarily dispositive, the federal appellate courts' views in 1988 are also "relevant," *Stringer*, 503 U.S. at 237, 112 S.Ct. at 1140, to determining whether *Gardner* and *Skipper* compelled the result in *Simmons*. The federal circuits were uniform in concluding not only that *Gardner* and *Skipper* did not compel that result, but that *Ramos* compelled precisely the opposite – deference to the States' choices about whether to inform juries about parole. In *Turner v. Bass*, 753 F.2d 342, 354 (4th Cir.1985) (Widener, Hall, Phillips, JJ.) (emphasis added), *rev'd on other grounds sub nom. Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), our circuit, for example, considered this issue and agreed with the Supreme Court of Virginia:

In arriving at its decision [in *Ramos*], the Court noted: "[o]ur conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their state should not be permitted to consider the governor's power to commute a sentence.³⁰" In footnote 30 the Court stated that "[m]any state courts have held it improper for the jury to consider or to be informed – through argument or instruction – of the possibility of commutation, pardon, or parole." [*Ramos*, 463 U.S. at 1013 & n. 30, 103 S.Ct. at 3460 & n. 30.] While not exactly on point, we think *Ramos* indicates that the Court would decide that while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required. We so hold.

In doing so, our circuit relied upon a decision of the Fifth Circuit, *O'Bryan v. Estelle*, 714 F.2d 365, 389 (5th Cir.1983), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984), which had understood *Ramos* as we had:

[W]e cannot say that an instruction on parole is constitutionally mandated in a capital case. See *California v. Ramos*, [463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171] (1983) (instruction informing jurors in capital case that governor has power to commute "life sentence without possibility of parole" but not informing them of equivalent power to commute death sentence not unconstitutional).

We do not find persuasive O'Dell's argument that *Turner v. Bass* and *O'Bryan* should be disregarded because they were decided before *Skipper*. The *Skipper* footnote addressing due process was merely a reaffirmation of the *Gardner* plurality, and it did not in any way draw into question *Ramos*. The reasonableness of the *Bass* and *O'Bryan* conclusion (now, under *Simmons*, held to be wrong) is confirmed by the fact that both circuits, like Virginia's Supreme Court, continued with their holdings regarding instructions on parole long after *Skipper*. See *Peterson v. Murray*, 904 F.2d 882, 886-87 (4th Cir.) (Hall, Sprouse, Wilkinson, JJ.) ("[W]e believe that *Ramos* left to the states the decision concerning what, if anything, a jury should be told about commutation, pardon, and parole." (citing *Turner v. Bass*)), *cert. denied*, 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990); *Knox v. Collins*, 928 F.2d 657, 660 (5th Cir.1991) (rejecting petitioner's claim "that the Constitution mandates instruction on parole in capital cases" and holding that "[t]he decision whether to require such an instruction rests entirely with the state

legislature"); cf. *United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir.1993) (holding that "[t]he range of possible sentences [including 'the possibility of life without parole'] that [petitioner] might receive in the event the jury did not recommend death does not fall within th[e] definition [of 'mitigating factors as 'any aspect of a defendant's character or record and any of the circumstances of the offense.' *Lockett v. Ohio* . . . ; *Skipper v. South Carolina*," and so] "the district court was not required to inform the jury of the possible sentences [petitioner] might face"), cert. denied, ___ U.S. ___, 114 S.Ct. 2724, 129 L.Ed.2d 848 (1994).

Nor do we believe it could even be contended that the decisions of the Fourth Circuit, the Fifth Circuit, and of the Virginia Supreme Court, that *Ramos* left the desirability of instructions on parole eligibility or ineligibility to the authority of the states, were in any way "objectively unreasonable." See *Stringer*, 503 U.S. at 237, 112 S.Ct. at 1140.

As *Butler* recognized in holding that *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), announced a new rule, "[t]hat the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits." 494 U.S. at 415, 110 S.Ct. at 1217.¹² Even

¹² See also *Caspari*, 510 U.S. at 395, 114 S.Ct. at 956 ("Two Federal Courts of Appeals and several state courts had reached conflicting holdings on the issue. Because that conflict concerned a 'developmen[t] in the law over which reasonable jurists [could] disagree,' *Sawyer v. Smith*, 497 U.S. 227, 234, 110

more so was "the outcome in [*Simmons*] . . . susceptible to debate among reasonable minds," as "evidenced" by the unanimous disagreement with that outcome by the Fourth and Fifth Circuits, and by the Virginia Supreme Court.

E.

We therefore conclude that the rule in *Simmons* – that due process requires that a capital defendant be allowed to rebut prosecution arguments of future dangerousness with his ineligibility for parole – was not compelled by existing precedent, and that the state and federal judges who held otherwise in 1988 were not objectively unreasonable in so holding.¹³ If, as the Court held in *Sawyer*, *Caldwell*'s limited exception that states cannot affirmatively provide inaccurate information to juries concerning their role is the sentencing process was not, because of *Ramos*' seemingly categorical deference to the states on such matters, compelled, then *a fortiori Simmons*' more

S.Ct. 2822, 2827, 111 L.Ed.2d 193 (1990), [ruling in petitioner's favor on habeas would announce a new rule].").

¹³ The district court's conclusion in footnote that the precedent in 1988 also dictated the result that the Eighth Amendment required that the jury be informed of future dangerousness, J.A. at 335, is inexplicable, considering that such a rule would be new even today. See *Simmons*, 512 U.S. at ___ n. 4, 114 S.Ct. at 2193 n. 4 (plurality); *id.* at ___, 114 S.Ct. at 2199 (Ginsburg, J., concurring); *id.* at ___, 114 S.Ct. at 2200 (O'Connor, J., concurring); cf. *id.* at ___-___, 114 S.Ct. at 2198-99 (Souter, J., concurring). For the same reasons that we hold that the precedent in 1988 did not compel the conclusion that due process required *Simmons*, we hold that the same precedent did not compel a conclusion that the Eighth Amendment required *Simmons*.

sweeping exception that states must affirmatively correct, or at least allow the correction of, pre-existing juror misconceptions concerning state post-sentencing laws and procedures, was, for the same reason, not compelled either.

It was, at the very least, not unreasonable for jurists to have concluded that the broad deference afforded the states with respect to informing juries of state law regarding commutation and parole had not been withdrawn from them by a mere plurality and a single majority footnote, the latter of which treated the due process holding so dismissively that three Justices criticized the Court as having "unnecessarily abandon[ed]" this grounds for decision, *Skipper*, 476 U.S. at 11, 106 S.Ct. at 1674 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.). Tellingly, this footnote, which O'Dell now maintains *compelled* the result in *Simmons*, was not even mentioned in O'Dell's own 151-page federal *habeas* petition filed in 1992 on his behalf by two major, nationally-recognized law firms, Hunton & Williams, and Paul, Weiss, Rifkind, Wharton & Garrison.

As Justice O'Connor reminded in *Johnson v. Texas* [509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290]:

When determining whether a rule is new, we do not ask whether it fairly can be discerned from our precedents; we do not even ask if most reasonable jurists would have discerned it from our precedents. We ask only whether the result was *dictated* by past cases, or whether it is "susceptible to debate among reasonable minds."

509 U.S. at 378, 113 S.Ct. at 2675 (O'Connor, J., dissenting, joined by Blackmun, Stevens, and Souter, JJ.). Considering that every Member of the Supreme Court of the United States – the five Members of the *Ramos* majority and the four dissenters – had seemed to expressly approve, as constitutionally permissible, the practice of the several states of forbidding any argument or instruction to the jury concerning commutation, pardon, or parole, and considering that that same Court rejected a claim virtually identical to that which prevailed in *Simmons*, if *Simmons* did not announce a new rule, then we are at a loss to understand how *Teague* has any real meaning at all.

Accordingly, we hold that *Simmons* announced a new rule under *Teague*, and, therefore, that O'Dell cannot avail himself of the rule of *Simmons*, unless it falls within "one of the two narrow exceptions to the nonretroactivity principle." *Caspari*, 510 U.S. at 390, 114 S.Ct. at 953.

F.

The first exception applies to those rules that place " 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' " *Teague*, 489 U.S. at 307, 109 S.Ct. at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1171, 1180, 28 L.Ed.2d 388 (1971) (opinion of Harlan, J.)), or "address[] a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " *Saffle*, 494 U.S. at 494, 110 S.Ct. at 1263 (quoting *Penry*, 492 U.S. at 329, 330, 109

S.Ct. at 2952, 2952). This exception "is clearly inapplicable here," *Gilmore*, 508 U.S. at 345, 113 S.Ct. at 2119, because the rule announced in *Simmons* "neither decriminalize[s] a class of conduct nor prohibit[s] the imposition of capital punishment on a particular class of persons [because of their status or offense]." *Saffle*, 494 U.S. at 495, 110 S.Ct. at 1263-64.

The second exception applies to "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal procedure." *Id.* (quoting *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075). This exception "is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478, 113 S.Ct. at 903 (internal quotations omitted). "A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 242, 110 S.Ct. at 2831 (quoting *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075 (quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180)). And, "[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, . . . it is unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313, 109 S.Ct. at 1077. We do not believe that the rule announced in *Simmons* is on par with the rule announced in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), a rule the Court has "usually cited . . . to illustrate the type of rule coming within the exception," *Saffle*, 494 U.S. at 495, 110 S.Ct. at 1264; see also *Gray*, ___ U.S. ___, 116 S.Ct. 2074, 2084, 135

L.Ed.2d 457, and we conclude that it does not come within the second exception to *Teague*.

We therefore hold that *Simmons* announced a new rule of which O'Dell cannot avail himself.¹⁴

¹⁴ Because we hold that *Simmons* announced a new rule, we do not address whether the failure to give the *Simmons* instruction in this case was harmless error under *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993) ("[H]abeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice,' " i.e., whether "the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946))).

Nevertheless, there are strong indications that even if it had been error, it would have been harmless under *Brecht* given the heinousness of the crime, O'Dell's lengthy and frightening criminal record, and O'Dell's own testimony from the stand that he would spend the rest of his life behind bars, J.A. at 2433. Moreover, the court's failure to inform the jury of parole ineligibility calls into question only the jury's finding of future dangerousness, leaving the vileness finding untouched, which may be sufficient to sustain the death penalty under *Zant v. Stephens*, 462 U.S. 862, 884, 103 S.Ct. 2733, 2746, 77 L.Ed.2d 235 (1983) ("[A] death penalty supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty."). Although the Virginia Supreme Court did state that "the jury did not base its verdict on the vileness predicate," O'Dell, 364 S.E.2d at 507, it appears to have clearly erred in saying this, as O'Dell himself appears to recognize. See Petitioner's Br. at 42-43. The jury verdict expressly stated that, in addition to finding that O'Dell posed a future danger,

having unanimously found that [O'Dell's] conduct in committing the offense was outrageously wanton,

III.

Before the federal district court on *habeas*, O'Dell raised innumerable constitutional claims. J.A. at 281-84. Nine of those claims were raised for the first time at the state *habeas* proceeding,¹⁵ although, as the state *habeas* court expressly found, *see* J.A. at 285, these claims had been ripe for presentation on direct appeal. Virginia law bars the consideration on *habeas* of trial errors that could be, but were not, raised on direct appeal. *Slayton v. Parri-gan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975). Therefore, the federal district court properly held that these claims were procedurally barred from review on federal *habeas* under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), absent cause and prejudice.

A.

The Commonwealth also argues that ten additional claims of O'Dell's before the federal *habeas* court are procedurally barred because the Virginia Supreme Court dismissed as untimely their appeal from the state *habeas*

vile or inhuman and it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

J.A. at 2506.

¹⁵ These claims were denominated Id, IIh, IV, V, VI, X, XI, XVIII, and XXII in the federal district court. J.A. at 286.

proceeding.¹⁶ After the state *habeas* court dismissed O'Dell's petition, he filed an "Assignments of Error" with the Virginia Supreme Court. Virginia law, however, requires that a "Petition for Appeal" be filed instead, in order to appeal from a denial of the writ of *habeas corpus*. By the time O'Dell attempted to correct his error, the three months to file such a petition had passed, and so the Virginia Supreme Court dismissed his Petition for Appeal as untimely under Va. S.Ct. Rule 5:17(a)(1).¹⁷ J.A. at 216. That dismissal is sufficient to bar federal *habeas* review of those claims,¹⁸ so long as the dismissal rested

¹⁶ These claims were denominated Ia, Ibi, Ibii, Ibiv, Ic, Ie, Ig, XVII, XX, and XXIII in the federal district court. J.A. at 285. Additionally, claims Id, V, VI, X, XI, XVIII, and XXII were also dismissed by the Virginia Supreme Court as untimely on appeal from the state *habeas* proceeding, but, because they were procedurally barred in any event under *Slayton*, *see supra*, we do not consider them further.

¹⁷ On March 6, 1991, the deputy chief clerk of the Virginia Supreme Court and an assistant state attorney general informed O'Dell that he should have filed a petition for appeal rather than assignments of error. J.A. at 287 n.3. O'Dell claims that the state assistant attorney general then told him over the telephone that he had "no objection" to O'Dell trying to "supplement" his filing, and that the Commonwealth would not oppose that supplementation. *Id.* Regardless of whether such a phone conversation actually took place, the Commonwealth did in fact oppose the motion to amend when it was filed on March 8, and the Virginia Supreme Court denied that motion, as was its prerogative.

¹⁸ That the full text of the Virginia Supreme Court opinion was but one sentence - "Finding that the appeal was not perfected in the manner provided by law, the Court rejects the petition for appeal in the above-styled case. Rule 5:17(a)(1)," J.A. at 216 - is of course of no moment. "[A] state court that

upon "adequate and independent state grounds." *Wainwright*, 433 U.S. at 81, 97 S.Ct. at 2503; see also *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636, 22 L.Ed. 429 (1874).

1.

The federal habeas court, relying on *James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984), and *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991), held that, because the distinction between assignments of error and petitions for appeal was not "firmly established and regularly followed" in capital cases, the Virginia Supreme Court's determination that these claims were procedurally barred as untimely was not a state ground "adequate" to bar federal habeas review. J.A. at 292 (quoting *James*, 466 U.S. at 348-49, 104 S.Ct. at 1835-36). In so holding, the district court did not conclude, and O'Dell has never maintained, that this distinction has not been "regularly followed";¹⁹ rather,

wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' " *Harris v. Reed*, 489 U.S. 255, 265 n. 12, 109 S.Ct. 1038, 1045 n. 12, 103 L.Ed.2d 308 (1989).

¹⁹ The Commonwealth argues, and O'Dell presents no evidence to the contrary, that "Virginia clearly and consistently requires the filing of a petition for appeal on any appeal from a judgment of the habeas corpus proceeding, regardless of whether the habeas case involves the death penalty." Respondent's Reply Br. at 32. See, e.g., *Yeatts v. Murray*, 249 Va. 285, 455 S.E.2d 18, 20 (1995) ("award[ing] Yeatts an appeal limited to [certain issues]" following circuit court's denial of petitioner's writ of habeas corpus); *id.* 455 S.E.2d at 21-22 (refusing to consider a claim raised in appellant's brief because it failed to comply with Rule 5:17(c) governing petitions for

the district court determined that the distinction failed the first requirement of *James*, that it be "firmly established." As a general matter, whenever a procedural rule is derived from state statutes and supreme court rules, as this one is, the rule is necessarily "firmly established."²⁰ The district court in this case, however, concluded that the many Virginia "rules are ambiguous on the procedure for appeals from the denial of state habeas decisions," J.A. at 291, and therefore that the distinction between petitions for appeal and assignments of error was not "firmly established."

On the face of those rules, however, we can discern no ambiguity whatsoever. Va. S.Ct. Rule 5:17(a)(1) (emphasis added) requires that a "petition for appeal" be filed with the clerk "[i]n every case in which the appellate

appeal); *Epperly v. Booker*, 235 Va. 35, 366 S.E.2d 62, 63 (1988) ("[T]he defendant filed a petition for a writ of habeas corpus in the court below, the court denied the petition, and we granted the petitioner an appeal." (emphasis added)); *Peterson v. Bass*, 2 Va.App. 314, 343 S.E.2d 475, 480 (1986) (Barrow, J., dissenting) ("Peterson has taken all steps necessary to entitle him to have his petition for appeal considered on its merits by the Supreme Court. He filed a timely notice of appeal to the Supreme Court and subsequently filed a timely petition for appeal [from his habeas petition attacking his capital conviction]."); compare *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621, 622-23 (1991) (considering, on direct capital appeal, defendant's assignments of error).

²⁰ Although unambiguous statutes or court rules are always "firmly established," new procedural rules created after the time they had to be obeyed, see *Ford*, 498 U.S. at 424-25, 111 S.Ct. at 857-58, and procedural distinctions regularly ignored by state courts, see *James*, 466 U.S. at 346-47, 104 S.Ct. at 1834-35, are by definition not.

jurisdiction of [the Virginia Supreme Court] is invoked. . . . " Here, the Virginia Supreme Court's appellate jurisdiction was invoked, and O'Dell did not file a petition for appeal.

The Virginia Supreme Court had appellate jurisdiction over this appeal under Va.Code § 17-116.05:1(B) (emphasis added), which provides that,

[i]n accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed, from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, . . . and from [other proceedings not relevant here].

Contrary to the district court's conclusion, J.A. at 290, this provision does not at all "indicate[] that the same procedural rules that apply to appeals of convictions in death penalty cases also apply to appeals from decisions of circuit courts involving habeas corpus petitions." Rather, the section is a jurisdictional provision; the title of the section even reads, as it pertains to the above-quoted subsection, "[C]ases over which Court of Appeals does not have jurisdiction."²¹ The provision does not in any

²¹ Prior to 1985, when this statute was amended to provide that appeals "involving" *habeas corpus* "lie directly" to the Supreme Court, such appeals were in the exclusive jurisdiction of the Court of Appeals. *Titcomb v. Wyant*, 323 S.E.2d 800 (Va.1984). Even after *Titcomb*, however, the Supreme Court retained jurisdiction for *habeas* appeals in capital cases, because "it would be inconsistent with the legislative design . . . to conclude that [the Court of Appeals] lack[ed] jurisdiction to hear direct appeals [in capital cases], but that[it]

way purport to control the *form* of the appeal for the several categories of cases that are to be appealed directly to the Virginia Supreme Court rather than to the intermediate Court of Appeals. In fact, it expressly provides that those appeals lie "in accordance with other applicable provisions of law." It would be odd, then, to read this section as altering the general rule that "[i]n every case in which the appellate jurisdiction of [the Supreme] Court is invoked, a petition for appeal *must* be filed." Va. S.Ct. Rule 5:17(a) (emphasis added).

Virginia does require the filing of assignments of error rather than a petition for appeal in its "Special Rule Applicable to Cases in Which Sentence of Death Has Been Imposed":

(a) Upon receipt of a record pursuant to § 17-110.1 B, the clerk of this Court shall notify

possess[ed] . . . jurisdiction [over *habeas* challenges to capital convictions]." *Peterson*, 343 S.E.2d at 478.

That the 1985 amendment was simply an alteration in jurisdiction over all *habeas* appeals has been recognized by the Virginia Courts:

It is clear from the 1985 amendment to Code § 17-116.05:1(B) that effective July 1, 1985, the General Assembly terminated the jurisdiction of [Virginia's intermediate appellate courts] to hear and determine appeals from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus. . . . [T]he clear legislative intent expressed in the 1985 amendment [was] that habeas corpus cases on appeal from the circuit court go directly to the Supreme Court.

White v. Garrahy, 2 Va.App. 117, 341 S.E.2d 402, 405-06 (1986); see also *Peterson*, 343 S.E.2d at 477 n. 4.

in writing counsel. . . . The case shall thereupon stand matured as if an appeal had been awarded to review the conviction and the sentence of death. . . .

(b) Within 10 days after the Filing Date, counsel for the appellant shall file with the clerk . . . assignments of error upon which he intends to rely for reversal of the conviction or review of the sentence of death.

Va. S.Ct. Rule 5:22 (emphasis added). It is plain, however, that this provision relates only to the *direct* review of death penalty sentences. That Rule 5:22 is confined to capital cases on direct review is confirmed on a number of grounds. First, the very title of the rule is "Special Rule Applicable to Cases in Which Sentence of Death Has Been Imposed." A sentence of death is *imposed* at the end of the sentencing phase of the trial; in no manner is the sentence *imposed* by a subsequent denial of the writ of *habeas corpus*. This distinction is unmistakable in light of section 17-116.05:1, *supra*, which provides for direct review by the Supreme Court of both "conviction[s] in which a sentence of death is imposed" and "final decision[s], judgment[s] or order[s] of a circuit court involving a petition for a writ of habeas corpus." If the two were identical, the provision of direct Supreme Court jurisdiction for each would be redundant. Additionally, the assignments of error referenced in Rule 5:22 are those "upon which [counsel] intends to rely for reversal of the conviction or review of the sentence of death." Neither remedy is available upon appeal from a denial of a writ of *habeas corpus*; the denial of the writ can be either affirmed or reversed, but the underlying conviction and sentence are not being reviewed (they are only reviewable on *direct* appeal). Cf.

Coleman v. Thompson, 501 U.S. 722, 730, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640 (1991) ("When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254, it must decide whether the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.' *The court does not review a judgment, but the lawfulness of the petitioner's custody simpliciter.*" (emphasis added)).

Moreover, Rule 5:22 on its own terms is triggered by receipt of a record pursuant to Va.Code § 17-110.1(B), a section unquestionably addressing direct review of death sentences:

§ 17-110.1. Review of death sentence. —

A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as possible, and the transcript filed forthwith . . . and transmit[ted] . . . to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
2. Whether the sentence of death is excessive or *disproportionate* to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. *Affirm the sentence of death;*
2. *Commute the sentence of death to imprisonment for life; or*
3. *Remand to the trial court for a new sentencing proceeding.*

...

F. *Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated.*

That this section addresses only direct review is self-evident. See *Payne v. Commonwealth*, 233 Va. 460, 357 S.E.2d 500, 508 ("In death penalty cases, . . . a defendant is afforded a *direct*, full review as a matter of right. Code § 17-110.1." (emphasis added)), *cert. denied*, 484 U.S. 933, 108 S.Ct. 308, 98 L.Ed.2d 267 (1987). As part A provides, the section is operative only "upon the judgment [of a sentence of death] becoming final in the circuit court." A sentence of death does not become final when a subsequent court denies a writ of *habeas corpus*; it becomes final upon the entry of the judgment by the trial court. Likewise, the proportionality review and independent examination of the sentence for arbitrariness provided for in part C occur on direct review, not *habeas*. And the remedies provided in part D – "affirm[ing] the sentence of death," "commut[ing] the sentence of death," and "remand[ing] to the trial court" – are not available at all to a court reviewing a denial of *habeas*; they are possible only on direct review.

Finally, part F makes absolutely clear that the entire section is addressed only to direct review of the death sentence itself (as even the title of the section sets forth), not even to the underlying conviction for capital murder. That underlying conviction may be, but, under this section need not necessarily be ("if taken"), consolidated with the direct review of the death sentence. Indeed, under Rule 5:22, that consolidation is automatic: "The case shall thereupon stand matured as if an appeal had been awarded to review the conviction and the sentence of death. . . ."

Thus, the Virginia statutory scheme is not at all ambiguous. As a general rule, a petition for appeal *must* be filed in every case for which review is sought by the Virginia Supreme Court. For direct review of death sentences and their accompanying capital convictions, Rule 5:22 (itself, denominated a "special rule") creates an exception, providing that assignments of error should instead be filed. But nowhere in that exception, or in section 17-110.1(B) to which it refers, is there any possible reference to appeals from a denial of a writ of *habeas corpus*. The only relevant reference to denials of writs of *habeas corpus* is in section 17-116.05:1, which provides merely that jurisdiction shall lie in the Supreme Court. And that section makes no reference to the form those appeals should take; so the general rule requiring a petition of appeal necessarily obtains.

We recognize that Justice Blackmun, joined by Justices Stevens and O'Connor, questioned whether the Virginia Supreme Court's dismissal of these claims as untimely constituted a state ground "adequate" to bar federal *habeas* review. See *O'Dell*, 502 U.S. at 997-98, 112

S.Ct. at 619-20 (Blackmun, J.). Justice Blackmun commented that the ground "may" not be "adequate" under *James* and *Ford* because of the "ambiguity of the Virginia statute." We believe, however, that upon closer inspection, there is no ambiguity at all.²² Therefore, we hold that the Virginia Supreme Court's dismissal of O'Dell's appeal from the denial of the writ of *habeas corpus* as untimely was a state ground "adequate" to bar federal *habeas* review.

2.

Although the district court did not agree, J.A. at 288, Justice Blackmun also commented that the Virginia Supreme Court's rejection "may" not have been "independent," in that it "fairly appears to rest primarily on federal law, or to be interwoven with the federal law,"

²² Because these procedural rules are expressly set out in unambiguous state statutes and supreme court rules, and because in Virginia they have been regularly followed, see *supra* note 19, they are qualitatively different from the rule at issue in *James*. In *James*, the distinction between jury "instructions" and "admonitions" was "not always clear or closely hewn to," as evidenced by the fact that the Kentucky Supreme Court had "recognized that the content of admonitions and instructions can overlap," had "acknowledged that 'sometimes matters more appropriately the subject of admonition are included with or as a part of the instructions,' " and had used the terms interchangeably for a number of years (as had the trial courts). 466 U.S. at 346-47, 104 S.Ct. at 1834-35. Likewise, because Virginia's rules existed long before the commencement of O'Dell's state *habeas* proceeding, they are nothing like the procedural rule that Georgia had applied retroactively in *Ford* to a proceeding that had been completed long before the creation of the rule.

Michigan v. Long, 463 U.S. 1032, 1040, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983), because, as in *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985), "the State has made application of the procedural bar depend on an antecedent ruling on federal law." Justice Blackmun observed,

the Virginia Supreme Court's rejection may not be based on an independent state ground because *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970), requires the Virginia Supreme Court to consider whether a constitutional right was abridged before denying an extension of time for filing a petition for appeal.

O'Dell, 502 U.S. at 998, 112 S.Ct. at 619-20.

Justice Blackmun then noted that this case "may be distinguishable," *id.* at 998 n. 5, 112 S.Ct. at 620 n. 5, from *Coleman*, which rejected a nearly identical claim, because here the Virginia Supreme Court was considering an untimely petition for appeal rather than the untimely notice of appeal at issue in *Coleman*. See also J.A. at 292 n.7 (federal district court distinguishing *Coleman* on same ground). But this possible distinction is refuted by the express language of *Coleman*. As Justice O'Connor wrote for the Court,

Ake was a direct review case. We have never applied its rule regarding independent state grounds in federal *habeas*. But even if *Ake* applies here, it does *Coleman* no good because the Virginia Supreme Court relied on an independent state procedural rule.

...

We are not convinced that *Tharp* stands for the rule that Coleman believes it does. Coleman reads that case as establishing a practice in the Virginia Supreme Court of examining the merits of all underlying constitutional claims *before denying a petition for appeal or writ of error as time barred*. A more natural reading is that the Virginia Supreme Court will only grant an extension of time if *the denial itself* would abridge a constitutional right. That is, the Virginia Supreme Court will extend its time requirement only in those cases in which the petitioner has a constitutional right to have the appeal heard.

Coleman, 501 U.S. at 741-42, 111 S.Ct. at 2560 (first and second emphases added).²³

We agree that the rule of *Ake* concerning the state procedural rules and underlying federal claims does not apply in the *habeas* context, and, regardless, because we read *Tharp* the same way that the Court in *Coleman* did, we hold that the Virginia Supreme Court's application of Va. S.Ct. Rule 5:17(a)(1) was also an independent state ground sufficient to bar federal *habeas* review.

3.

Because the Virginia Supreme Court's application of Rule 5:17(a)(1) was an "adequate and independent state

²³ The Court in *Coleman* did comment that the Virginia Supreme Court had there not applied *Tharp* because that case concerns only petitions for appeal, as contrasted to the "purely ministerial" notice of appeal at issue in *Coleman* – but it did so only as an alternative holding, following the aforementioned analysis of *Tharp* and the qualifying phrase, "[e]ven if we accept Coleman's reading of *Tharp*." *Id.*

ground," federal *habeas* review of O'Dell's defaulted claims, *which are meritless in any event*,²⁴ is barred absent

²⁴ The district court, because it found that Rule 5:17(a)(1) was not an adequate and independent state ground under *James*, proceeded to rule against O'Dell on the merits of these claims. Principally, the claims were that O'Dell was not competent to waive his right to counsel, that, at a minimum, his competency was never appropriately determined, and that even if he was competent, his waiver of the right to counsel was not voluntary, knowing, and intelligent. Although it should not have reached the claims, on the merits, the district court correctly rejected them.

First, the standard for competency to waive the right to counsel is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Godinez v. Moran*, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685, 125 L.Ed.2d 321 (1993). After examining O'Dell, Dr. Kreider, the court-appointed psychiatrist, questioned the reliability of an earlier diagnosis of schizophrenia, J.A. at 2666, and concluded that O'Dell was competent "to make a voluntary and intelligent decision to waive his right to counsel and prepare his own defense," J.A. at 312, an assessment with which both O'Dell's attorney and the trial court agreed. J.A. at 2511, 2709, 2712. Moreover, because Dr. Kreider was familiar with the standard for finding a defendant competent to stand trial, J.A. at 313, 2642-45, 2682-83, and because that standard is identical to the standard for waiving the right to counsel, *Godinez*, 509 U.S. at 397, 113 S.Ct. at 2685, Dr. Kreider's determination was more than adequate, as both the state and federal *habeas* courts found. J.A. at 2760, 2776-77, 313-14.

Second, O'Dell claims that his competency was never appropriately determined because Dr. Kreider is a "therapeutic psychiatrist" and not a "forensic psychiatrist." Although O'Dell cites *Ake* for the proposition that "[w]hen the mental state of a defendant is at issue, due process requires that a defendant be provided with a qualified expert psychiatrist to assist with his defense," Petitioner's Br. at 61, he misreads *Ake* to establish a general due process right to psychiatric assistance where none exists. In *Ake*, the Court held only that,

cause and prejudice. That the default was only procedural, does nothing to insulate the claims from this bar. As Justice O'Connor explained for the Court in *Coleman*,

when a defendant demonstrates to the trial judge that his *sanity at the time of the offense* is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in . . . the defense.

470 U.S. at 83, 105 S.Ct. at 1096 (emphasis added). *Ake* thus says nothing about determining "competency" to stand trial or waive counsel; it deals only with a defendant's "sanity" at "the time of the offense," as the state *habeas* court properly held, J.A. at 2776. And in *Godinez*, the Court noted that a court is *not*

required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence.

Godinez, 509 U.S. at 401 n. 13, 113 S.Ct. at 2688 n. 13.

Regardless, Dr. Kreider was more than qualified to make the competency determination; he has an M.D. from the University of Chicago School of Medicine, has completed a psychiatric residency at the Philadelphia Naval Hospital, and has served as a psychiatrist in the Navy and in private practice from 1965 to the present. J.A. at 2640-42. Both the state and federal *habeas* courts found Dr. Kreider fully qualified to make the competency determination.

Finally, O'Dell claims that his conviction must be vacated because he did not waive his right to counsel voluntarily, knowingly, and intelligently. O'Dell claims that the district court's refusal to replace defense counsel, with whom O'Dell had a confrontational and distrustful relationship, left O'Dell "no choice" but to dismiss counsel and proceed *pro se*. But "[t]he

we [sic] [have repeatedly] emphasized the important interests served by state procedural rules at every stage

determination of whether or not the motion for substitution of counsel should be granted is within the discretion of the trial court." *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir.), *cert. denied*, 487 U.S. 1211, 108 S.Ct. 2858, 101 L.Ed.2d 895 (1988). The trial judge was in a far better position than a federal *habeas* court to assess the relationship between O'Dell and his attorney. As the trial court stated on the record,

[f]rom everything I've seen, since Mr. Ray was appointed in this case, he's done everything in his power to get those material things that should be heard before the Court for a hearing, and I've absolutely no evidence whatsoever that this man hasn't done an outstanding job for you at this point or that there is any credibility whatsoever in the allegations which you have made with respect to him. None whatsoever.

J.A. at 319; *see also* J.A. at 3008. Although his opinion on Ray varied, at times, O'Dell also shared this assessment of Ray's competency. J.A. at 435, 2513, 3008; Tr. 9/8/86 Vol. 53, 201-02. In any event, the trial court found that O'Dell was receiving adequate counsel and accordingly refused to substitute counsel. And, "once the trial court has appropriately determined that a substitution of counsel is not warranted, the court can insist that the defendant choose between continuing representation by his existing counsel and appearing *pro se*." *Gallop*, 838 F.2d at 109.

It also appears that O'Dell's waiver was knowingly and intelligently made. The trial court repeatedly warned O'Dell of the dangers of proceeding *pro se*, O'Dell was repeatedly asked if he understood what he was doing, and the court even allowed him to change his mind several times. J.A. at 318-19, 3007-08, 3011-12, 3016, 3021-22, 3332-33, 3340. If there was any problem in the attorney-client relationship, it was likely caused by O'Dell. As the federal *habeas* court concluded, "O'Dell's distrust of Ray was not based on objective facts; it was based on pure speculation." J.A. at 320.

of the judicial process and the harm to the States that results when federal courts ignore these rules: "... 'Each State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of judicial process at which they can be resolved most fairly and efficiently.' "

501 U.S. at 749, 111 S.Ct. at 2564 (quoting *Murray v. Carrier*, 477 U.S. 478, 490-91, 106 S.Ct. 2639, 2646-47, 91 L.Ed.2d 397 (1986) (quoting *Reed v. Ross*, 468 U.S. 1, 10, 104 S.Ct. 2901, 2907, 82 L.Ed.2d 1 (1984))). Nor does the fact that O'Dell's failure to timely file the required petition for appeal was almost certainly unintentional insulate him from the consequences of that failure:

By filing late [petitioner] defaulted his entire state collateral appeal. This no doubt an inadvertent error, and [Virginia] concedes that [petitioner] did not "understandingly and knowingly" forgo the privilege of state collateral appeal. . . . [Nonetheless] federal habeas review of the claims is barred [absent cause and prejudice].

Id. at 749-50, 111 S.Ct. at 2564-65.

B.

Having concluded that O'Dell procedurally defaulted nineteen of his claims (the nine under *Slayton* and the ten

And, an independent and thorough examination of the record reveals that O'Dell, who was "very intelligent," had a college equivalency education, and "exhibit[ed] tremendous [courtroom] skills," J.A. at 3011, 2406, 3333, defended himself far more ably than many practicing attorneys could have done.

under Rule 5:17(a)(1)), we now address whether the federal habeas court could nevertheless consider those claims on the merits. As the Court held in *Coleman*,

[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

501 U.S. at 750, 111 S.Ct. at 2565.

On appeal, O'Dell does not even attempt to demonstrate cause and prejudice; instead, he argues that failure to consider his defaulted claims will result in a "fundamental miscarriage of justice" because he has presented new evidence of "actual innocence." O'Dell's claim "of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 862, 122 L.Ed.2d 203 (1993).²⁵

²⁵ Although O'Dell asserts that this new evidence is enough to meet the "extraordinarily high" threshold of a freestanding constitutional claim of actual innocence, *Herrera*, 506 U.S. at 417, 113 S.Ct. at 869, he devotes only one sentence of his voluminous briefing to this issue. See Petitioner's Br. at 52. Assuming *arguendo* that such a claim is even possible, but see *Herrera*, 506 U.S. at 416-17, 113 S.Ct. at 868-69, we agree with the district court that O'Dell did not come even close to making such a "truly persuasive demonstration." J.A. at 297.

Last Term, the Supreme Court held that the proper test for whether a *habeas* petitioner has established that his case is "extraordinary" enough to fall into that "narrow class of cases," which "implicat[e] a fundamental miscarriage of justice," *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991), is whether that petitioner has shown that "a constitutional violation has *probably resulted* in the conviction of one who is actually innocent." *Schlup v. Delo*, ___ U.S. ___, 115 S.Ct. 851, 867, 130 L.Ed.2d 808 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986)) (emphasis added).²⁶ Thus, in order to

²⁶ The Commonwealth argues that a claim of actual innocence cannot succeed unless the petitioner demonstrates that "but for a constitutional violation" his actual innocence would have been established. Respondent's Reply Br. at 19. Because none of the procedurally barred constitutional claims prevented the jury from hearing the DNA evidence or any of the other evidence O'Dell claims proves his innocence, the Commonwealth maintains that they cannot be reviewed regardless of the new evidence.

Prior to *Schlup*, our circuit did require petitioners to link their exculpatory evidence to a specific constitutional error that prevented the jury from adequately considering the evidence. See *Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir.1994). *Spencer*, however, rested on *Sawyer*, which was rejected by *Schlup* for claims of actual innocence of the crime itself. *Schlup* makes no mention of a "but for" requirement, but it does note in *dictum* that an actual innocence claim that "accompanies" an "assertion of constitutional error at trial," is reviewable. *Schlup*, ___ U.S. at ___, 115 S.Ct. at 861. Although the plurality in *Schlup* did not use the term "but for," neither did the Court expressly abandon it. And, the Court continued to rely on *Carrier* and *McCleskey*, both of which require that a constitutional violation "probably" "result" in (*Carrier*) or "cause" (*McCleskey*) the conviction of

have his procedurally defaulted claim reviewed nonetheless on federal *habeas*, O'Dell must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."²⁷ *Id.*

The new evidence that O'Dell proffers as support for his claim of actual innocence is a recently conducted DNA test of blood found on O'Dell's clothing. In his statement accompanying the denial of *certiorari* on direct review of the state *habeas* denial, Justice Blackmun expressed the view that "there are serious questions as to whether O'Dell committed the crime" in light of this DNA evidence. *O'Dell*, 502 U.S. at 998, 112 S.Ct. at 619 (Blackmun, J.). Because of these concerns detailed in Justice Blackmun's statement respecting denial of *certiorari*, J.A. at 300, the federal district court conducted a full evidentiary hearing on the DNA evidence. At that hearing, O'Dell presented the results of DNA tests performed

one actually innocent. See *id.* at ___, 115 S.Ct. at 867. Because we conclude that, regardless, O'Dell has not presented sufficient evidence to demonstrate actual innocence, we need not reach whether a "but for" requirement remains after *Schlup*.

²⁷ Even if petitioner makes this showing, it may still be within the court's discretion to decline to review his procedurally defaulted claims. As Justice O'Connor observed in *Schlup*, "the Court d[id] not, and need not, decide whether the fundamental miscarriage of justice exception is a discretionary remedy." ___ U.S. at ___, 115 S.Ct. at 870 (O'Connor, J., concurring). And, of course, under *Marks*, Justice O'Connor's reservation of this issue causes it to necessarily "be an accurate description of what the Court . . . holds, since the narrower ground taken by one of the Justices comprising a five-Justice majority becomes the law." *Schlup*, ___ U.S. at ___ n. 1, 115 S.Ct. at 875 n. 1 (Scalia, J., dissenting).

on his blood-soaked clothing some five years after the crime, in an effort to refute the evidence at his original trial that the blood stains were consistent with Helen Schartner's blood but not with his own.

1.

At O'Dell's original trial, the Commonwealth's expert Jacqueline Emrich testified at length about the numerous tests she performed upon the various relevant blood stains.²⁸ In addition to testing for standard ABO blood type, Emrich tested for the following ten enzymes: EsD, PGM, PepA, GLO, EAP, AK, ADA, GC, Tf, and Hp. J.A. at 1851. Ms. Emrich tested blood stains on O'Dell's blue jacket, and found them consistent with Helen Schartner's blood and inconsistent with O'Dell's. J.A. at 1857. She likewise tested three separate stains on O'Dell's checkered shirt, and found them all consistent with Schartner's blood but not O'Dell's. J.A. at 1859-60. And

²⁸ O'Dell now attacks Emrich as a "neophyte," claiming that her testimony should be discounted. However, it is not clear on the record that O'Dell challenged her qualifications at trial, J.A. at 1827, and regardless, the Virginia Supreme Court expressly found that "the trial court did not err in admitting in evidence the results of the electrophoretic tests," *O'Dell*, 364 S.E.2d at 504. The state *habeas* court heard testimony that Ms. Emrich's "work has always been outstanding," J.A. at 2752, and found that "the Supreme Court of Virginia has already ruled that the serological evidence produced at trial was competent and properly admitted into evidence and considered by the jury. *It is not the function of the writ of habeas corpus to undertake to serve as an appellate court over the decision reached by the Supreme Court,*" J.A. at 2777-78 (emphasis added). Likewise, we, too, on federal *habeas*, are bound by the Virginia Supreme Court's finding.

she tested two stains on O'Dell's tan jacket, finding them both consistent with Schartner's blood but not O'Dell's. J.A. at 1861. Additionally, Ms. Emrich tested O'Dell's jeans; most of the Helen Schartner's torn clothing; a sardine can; a red cloth; and the right front seat back, the right seat back, the seat cover, the left seat back, and the right rear floormat of O'Dell's car – *all* of which revealed blood stains consistent with Helen Schartner's blood but not with O'Dell's. J.A. at 1862-75.

Helen Schartner had type O blood; O'Dell has type A. J.A. at 1850, 1852. Five of the their enzyme markers were the same, and five were different. J.A. at 1853-55. Although not all ten enzymes types were identifiable from every single stain, each stain mentioned above proved to be type O blood and matched Helen Schartner's blood (in a way inconsistent with O'Dell's) for *every single identifiable enzyme*. In addition, Ms. Emrich also found one other blood stain in O'Dell's car that was different from both Schartner's and O'Dell's blood. J.A. at 1871.

2.

Five years after the trial, O'Dell requested permission to have DNA testing performed on the evidence that was introduced at trial, testing which was not commonly available when he was tried in 1986. The Commonwealth consented, and O'Dell proposed that the evidence be sent to LifeCodes laboratory. The Commonwealth again consented. J.A. at 2895. LifeCodes was only able to test the shirt and the blue jacket, because the blood samples on the remaining items had deteriorated too much in the five

years to be of use. See Petitioner's Reply Memorandum in Support of Motion to Supplement Oral Argument at 3 & Ex. A. The LifeCodes Report concluded that the blood stain on the shirt "can be excluded as having a common origin" with either Helen Schartner's or O'Dell's blood, but that *the blood on the blue jacket "matched the DNA-PRINT pattern from the blood of Helen Schartner."* J.A. at 2990 (emphasis added).

Before the state *habeas* court, and again before the federal *habeas* court, O'Dell presented expert testimony embracing the first LifeCodes conclusion and attacking the second. Specifically, his experts testified that, based upon their own evaluation of the LifeCodes data, the variations between the blood on the blue jacket and Schartner's blood exceeded LifeCodes' own match criterion of 1.8%, and so the jacket should be considered "inconclusive" rather than a "match." J.A. at 2602, 2860, 2871.

The Commonwealth's experts agreed that the DNA tests proved that the blood on O'Dell's shirt came from neither Schartner nor O'Dell, but they testified that the LifeCodes data demonstrate that the blood on the blue jacket matched Helen Schartner's blood, for two reasons. First, as O'Dell's experts were forced to largely concede, J.A. at 2869-71, the DNA patterns on the blue jacket fell well within the state laboratory's and the FBI's match criterion of 2.5%. J.A. at 2728, 2731, 2802, 2808, 2812-13, 2838. And second, as O'Dell's experts again had to concede, J.A. at 2871-72, "band shifting" and "partial degradation," had occurred in the samples and could account for the differentials, J.A. at 2804, 2821, 2839-40, 2990 -

which is why LifeCodes performed further tests and ultimately concluded the blue jacket was a "match," J.A. at 2732-33, 2738-39, 2840, 2891, 2990.

O'Dell's experts, in turn, had two responses. First, under the standards of the National Research Council - described by the Commonwealth's expert as a committee issuing "recommendations," not "accepted by the scientific community generally," and currently under revision because "over 300 distinguished scientists" petitioned for their modification due to inaccuracies, J.A. at 2827-30 - "[e]ach laboratory should determine their own match criteria." J.A. at 2832, 2857. *But see* J.A. at 2738, 2853. Therefore, O'Dell's experts argued, it was improper for the Commonwealth's experts to substitute the state laboratory's and the FBI's match criteria for LifeCodes' (although it was apparently proper for them to substitute their *conclusion* for LifeCodes'). Second, according to O'Dell's experts and that same NRC Report, use of a monomorphic probe - upon which LifeCodes relied to correct the conceded band shifting, J.A. at 2839-40 - is ineffective to correct band shifting. J.A. at 2840-43, 2872. Of course, O'Dell's primary expert, Dr. Spence, a medical geneticist, performed approximately 98% of his work in a clinical environment where, if band shifting occurred, he could simply take another sample from his living patients. J.A. at 2880-87, 2598, 2604-05. The Commonwealth's expert countered, "[i]n the forensic field . . . we only have so much of the sample. It is not like in the clinical laboratory environment where you have a lot of blood where you can go back and repeat a sample. . . . [Therefore] [w]e don't ignore [band shifting and partialling; we try to correct them]." J.A. at 2846-47, 2742-43.

3.

The federal *habeas* court's factual findings regarding this testimony are not particularly helpful,²⁹ but the court did expressly credit O'Dell's experts concerning the impropriety of substituting the state crime lab's and the FBI's match criterion for LifeCodes'. J.A. at 308. The district court further commented that use of monomorphic probes to correct for band shifting is "controversial" *Id.* (citing *People v. Keene*, 156 Misc.2d 108, 591 N.Y.S.2d 733 (N.Y.Sup.Ct.1992)). Together, these two findings suggest that it agreed that the stains on the jacket were "inconclusive."

Nevertheless, the district court was forced to conclude, J.A. at 308, under the legal standard then in force, that O'Dell's new evidence failed to establish actual innocence, because it did not demonstrate "by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner" guilty

²⁹ The federal *habeas* court concluded, "[b]ased on the evidence at the evidentiary hearing, the blood on the jacket and the blood on the checkered shirt can be excluded as having a common origin. Again, based on the evidence, the DNA comparison of the blood on the checkered shirt and the victim's blood yielded a result that is 'inconclusive.'" J.A. at 307-08. This conclusion is unhelpful and, indeed, is somewhat odd, in that it restates an issue that nobody disputes, states another that is contrary to the evidence, and ignores the hotly contested issue in the testimony. Every expert agreed that the stain on the shirt could be "excluded" from coming from Schartner, yet the district court characterizes the comparison as "inconclusive." However, the real issue in dispute – whether the stain on the jacket was a "match" or "inconclusive" – was ignored in the district court's conclusions.

of murder. This standard, established by the Court in *Sawyer v. Whitley*, 505 U.S. 333, 336, 112 S.Ct. 2514, 2517, 120 L.Ed.2d 269 (1992), for claims of actual innocence of the death penalty, was adopted by this circuit for claims of actual innocence of the underlying crime as well. *Spencer*, 18 F.3d at 236. Of course, the Court subsequently rejected application of the *Sawyer* standard to actual innocence claims at the guilt phase of trials, instead adopting the more lenient test of *Murray v. Carrier*, 477 U.S. at 496, 106 S.Ct. at 2649: whether petitioner has shown that " 'a constitutional violation has probably resulted in the conviction of one who is actually innocent,' " that is, whether "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, ___ U.S. at ___, 115 S.Ct. at 867 (quoting *Carrier*).

Because the federal district court applied *Sawyer* instead of *Carrier*, and because the court did in a footnote *dictum* find that O'Dell would have met a less demanding standard of "a 'fair probability' that, in light of all probative evidence available at the time of his federal evidentiary hearing, 'the trier of the facts would have entertained a reasonable doubt of his guilt,'" J.A. at 308 n.18, O'Dell argues that, at the very least, we must remand the case to the district court to determine whether O'Dell's evidence meets the newly applicable standard. Under the particular facts of this case, however, and given that the district court has already made the kinds of findings that are peculiarly within its province, we disagree.

The "fair probability" standard relied upon by the district court in its *obiter dictum*, drawn from Justice Powell's plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n. 17, 106 S.Ct. 2616, 2627 n. 17, 91 L.Ed.2d 364 (1986),

is "similar" to the *Carrier* standard, *Schlup*, ___ U.S. at ___, 115 S.Ct. at 863, and has been treated as functionally the same, *id.* at ___-___, 115 S.Ct. at 864-65. Under *Schlup*, though, it is the *Carrier* formulation that is now controlling: Has O'Dell established that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence?" *Id.* at ___, 115 S.Ct. at 867.

This question is a mixed question of fact and law;³⁰ indeed, the dissent in *Schlup* characterized it as

a classic mixing of apples and oranges. "More likely than not" is a quintessential charge to the finder of fact, while "no reasonable juror would have convicted him in the light of the new evidence" is an equally quintessential conclusion of law. . . .

Id. at ___, 115 S.Ct. at 873 (Rehnquist, C.J., dissenting). Because this "hybrid . . . is bound to be a source of confusion," *id.*, we pause to attempt to fathom it fully.

The district court, in making this determination, must look at two elements: first, all of the evidence that the jury heard at trial, and second, the newly proffered evidence. See *Schlup*, ___ U.S. at ___, 115 S.Ct. at 867. If it were to look at only the former, and to ask only whether no reasonable juror could have convicted, then it would

³⁰ Justice O'Connor, a necessary member of the majority in *Schlup*, made clear that the Court did not "disturb the traditional discretion of district courts in this area, nor d[id] it speak to the standard of appellate review for such judgments." ___ U.S. at ___, 115 S.Ct. at 870 (O'Connor, concurring). Because the district court abused its discretion by applying the wrong legal standard, the Court did not address whether any less deferential standard of review need apply. *Id.*

be doing nothing more than evaluating the sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), a question of law reviewable *de novo*. But the *Carrier* inquiry is different from that under *Jackson* in two respects. First, it is asking not whether no reasonable juror *could* convict – a question of "power" – but whether no reasonable juror *would* convict – a question of "likely behavior." *Schlup*, ___ U.S. at ___, 115 S.Ct. at 868. Thus, the *Carrier* standard "requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* Second, *Carrier* adds to the calculus the quantum of new evidence that the petitioner presents, evidence whose credibility must be determined and evidence which may call into question the credibility of prior evidence presented at trial. *Id.* at ___-___, 115 S.Ct. at 868-69.

Ascertaining the credibility of evidence is "quintessentially" a task for the fact-finder, and so the district court's factual findings regarding the credibility of testimony it has actually heard are findings subject to review only under a clearly erroneous standard. But the federal district court is in no better position than an appellate court to then add that new evidence to the evidence that was presented at trial or to speculate as to the likelihood that no reasonable juror would convict based on the sum of all the evidence. Both courts, reviewing a cold trial record, must determine whatever inferences and deductions logically and reasonably can be made from all of the evidence and then, to the best of their ability, guess as to the likelihood that *no* reasonable juror would make those inferences necessary for conviction. This is in some sense

an application of "law" to facts. In any event, we believe that such determinations are, for lack of a better word, "mixed" questions of law and fact, and so are reviewable *de novo*.

In *Schlup* the Court remanded to the Court of Appeals with instructions to remand to the district court, but it did so there only because that was "the most expeditious procedure" in light of the "fact-intensive nature of the inquiry, together with the District Court's ability to take testimony from the few key witnesses if it deems that course advisable." ___ U.S. at ___, 115 S.Ct. at 869. In *Schlup*, "both the Court of Appeals and the District Court [had] evaluated the record under an improper standard," *id.*, and the district court had heard no testimony whatsoever, *id.* at ___, 115 S.Ct. at 854. Here, in contrast, the district court has conducted a full evidentiary hearing, made adequate factual findings, and we are now able to apply the correct legal standard on appeal.

Because the district court made sufficient factual findings as to the credibility of the witnesses that it heard, and because the remaining portion of the *Carrier* inquiry is simply an application of law to the combination of those facts and the trial record facts, we turn ourselves to the question of whether O'Dell has established that it is more likely than not that no reasonable juror would convict him.

4.

We do not believe that O'Dell has come even close to meeting either the *Kuhlmann* standard or the "similar"

Carrier standard. A reasonable juror examining all of the evidence would have confronted the following.

First, the mountain of circumstantial evidence. On the night of the murder, both O'Dell and Schartner were at the County Line Lounge. O'Dell left the club within fifteen minutes of when Schartner left.³¹ Not more than two and a half hours later, O'Dell appeared at a convenience store with blood on his face, hands, hair, and clothes. The next morning, O'Dell informed his former girlfriend that he was going to Florida, and, several hours later, Schartner's bloody body was found in a field across the street from the County Line Lounge.

O'Dell's first explanation for being covered in blood, which he gave his former girlfriend that next morning and which he now admits was a lie, was that he had vomited blood all over himself. His second explanation, which he told the police when he was arrested, was that the blood was from a nose bleed caused by being struck when he attempted to stop a fight at another club that same night.³²

³¹ In his briefing, O'Dell persists on disputing the time he left the club, relying on trial testimony that he was there over a half hour after Schartner left. See Petitioner's Br. at 47. But the Virginia Supreme Court expressly found that O'Dell left within fifteen minutes of when Schartner left, *O'Dell*, 364 S.E.2d at 495, and, under section 2254(d) and *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), we must accept that factual finding, supported by substantial evidence, as true.

³² O'Dell maintains that this second story is true and that trial testimony supported it. For this proposition, see Petitioner's Br. at 7, O'Dell cites his own federal writ of *habeas corpus*, J.A. at 35. His writ in turn cites trial testimony, not that

Helen Schartner's head had been beaten brutally with a "linear cylindrical object." J.A. at 1414. O'Dell had been seen about a week earlier with a pellet gun in his car, J.A. at 1531-36, and medical testimony established that Schartner's wounds were consistent with the weight and shape of that type of pellet gun, J.A. at 1413-17. Moreover, tire tracks found at the crime scene had the "identical" design elements as the tires on O'Dell's car, J.A. at 1258, 1266. *After examining patterns for some two thousand different tires and four or five thousand different design units, the Commonwealth's expert could not find a single tire, other than O'Dell's, that matched the tire tracks found at the scene.* J.A. at 1258-59, 1263.

Additionally, the direct physical evidence linking O'Dell to the murder is overwhelming. On the right front seatcover of O'Dell's car, investigators found a head hair consistent with Helen Schartner's but not with O'Dell's hair. J.A. at 1912-13. On the "left seat driver's seat back cover" of O'Dell's car, investigators found two hairs consistent with Schartner's head hairs and inconsistent with

O'Dell was bloodied breaking up a fight, but merely that a fight had occurred at the Brass Rail bar that night and that when the supervisor went outside he did not see anyone other than O'Dell, who was covered in blood. O'Dell then claimed that the persons who had been fighting had left.

O'Dell concedes that this is contrary to the story he told Connie Craig, J.A. at 2432, but maintains that he lied to Craig only to prevent her from telling his parole officer he had been fighting at the bars, as she had done on a previous occasion. Of course, Craig testified that O'Dell went to the County Line Lounge on "practically" every Tuesday, J.A. at 1098, and that he had told her he had been at the County Line Lounge on the very night in question, J.A. at 1093-94, 1098.

O'Dell's, three hairs consistent with O'Dell's head hairs and inconsistent with Schartner's, and two hairs consistent with neither's. J.A. at 1913-14. And, on the right front floor mat of O'Dell's car, investigators found one hair, *consistent with Helen Schartner's pubic hair, and not with O'Dell's.* J.A. at 1914-15.

Investigators also found, in Schartner's vagina and anus and on O'Dell's shirt, seminal fluid that was consistent with a mixture of O'Dell's and Schartner's bodily fluids. J.A. at 1889-96. O'Dell on this appeal argues strenuously that the alleged "mixture" of bodily fluids found in Schartner's anus shows that he could not have raped her, because Schartner could not secrete vaginal fluids from her anus. Not only is O'Dell not free to challenge this now on federal *habeas* (because he has proffered no new evidence relating to the seminal fluids and the Virginia Supreme Court expressly found that the vaginal and anal fluids were consistent with O'Dell's, *O'Dell*, 364 S.E.2d at 495), he is wrong in any event. As the Commonwealth's expert Ms. Emrich explained at trial, and as O'Dell's appellate counsel apparently misunderstands, the fluid found in Schartner is the predictable result of mixing fluids from two secretors, like Schartner and O'Dell. J.A. at 1881-84.

Secretors are persons whose bodily fluids carry with them characteristics of their blood type; both Schartner and O'Dell were secretors. Schartner's blood type was O, and her PGM type and PepA type (the two enzymes that are evident in bodily fluids) were 2-1 and 1, respectively. O'Dell's blood type is A, his PGM type 1, and his PepA type 1. Because both Schartner and O'Dell had the same

PepA type (1), the presence of that enzyme is not particularly revealing. The other two types, however, are quite revealing.

As Emrich explained, both blood types and enzyme types function in essentially the same way. Blood type A indicates the presence of the A antigen, type B indicates the presence of B, AB indicates the presence of both, and O indicates the presence of neither. If you mix A with B, the mixture is AB; if you mix either A or B with AB, the mixture is still AB; and if you mix A or B or AB with O, the mixture is A, or B, or AB (depending on which you added to O). Likewise, there are three common types of PGM, 1, 2, and 2-1. Type 2-1, like blood type AB, is simply a combination of types 1 and 2. Thus, if you mix 1 with 2, the combination is 2-1, as is the combination of either 1 or 2 with 2-1. J.A. at 1881-88.

In Schartner's vagina, Emrich found seminal fluid indicating blood type A, PepA 1, and PGM 2-1. J.A. at 1889-90. The blood type (A) is consistent with a mixture of O'Dell's (A) and Schartner's (O) bodily fluids, the PepA type is consistent with both of their fluids, and the PGM type (2-1) is consistent with a mixture of O'Dell's (1) and Schartner's (2-1) bodily fluids. J.A. at 1890. That same mixture was found in Schartner's anus, J.A. at 1891-92, and on three stains on O'Dell's shirt, J.A. at 1895-96.

Even more incriminating were the spermatozoa found in Schartner's genital swabs and in her genital scrapings. Those spermatozoa were blood type A, PepA 1, and PGM 1, consistent with O'Dell's blood and enzyme types and not with Schartner's. J.A. at 1893-94. Thus, the

spermatozoa, which could only have come from a man, matched perfectly the sperm cells of Joseph O'Dell, and the seminal fluid, which presumably came from the same man who produced the spermatozoa, was entirely consistent with a mixture of O'Dell's and Schartner's bodily fluids.

And herein lies the obvious failing in O'Dell's argument. O'Dell maintains that, because seminal fluid type A, PepA 1, PGM 2-1, was found in Schartner's anus, and because the anus does not secrete vaginal fluids (and, presumably, he for some reason also asserts, by silent implication and without evidence, that there are no other bodily secretions in the anus), the man who raped Schartner must have had type A, PepA 1, PGM 2-1 semen, not type A, PepA 1, PGM 1 like O'Dell's. But, as the expert testimony explained, seminal fluid is capable of mixing with other fluids to pick up their markers; the spermatozoa, on the other hand, were the man's alone, and they were type A, PepA 1, PGM 1. Unless we are to indulge the fanciful possibility that the sperm and the seminal fluid found in Schartner came from different men, the only reasonable implication from this is that the rapist's sperm and seminal fluid (prior to mixing with Schartner's fluids) were both originally type A, PepA 1, PGM 1 - exactly like O'Dell's.

In addition, a reasonable juror would also consider the testimony of Steven Watson, to whom O'Dell confessed to murdering Helen Schartner. Watson testified that O'Dell told him in jail that he had met Schartner at the County Line Lounge, bought her a few drinks, took her riding in his green Camaro, tried to "get a little" from her, and, when she refused to "give it up," strangled her and dumped her body. J.A. at 1674, 1685. Watson also testified

that O'Dell had told him that "he was going to walk on the charge" because "they didn't have no evidence" and "no one had actually seen him kill her." J.A. at 1675, 1686. Watson further testified that he had never seen anything about the murder on television or in the newspaper, J.A. at 1675, 1686, and that he had neither been offered nor received anything in return for his testimony, J.A. at 1675-76, 1680-82.

The jury heard at great length about Watson's prior convictions, and O'Dell cross-examined him and other witnesses repeatedly attempting to uncover any deal between Watson and the authorities. J.A. at 1680-81, 1689-96, 2023-24, 2050. In addition, the jury heard about the recent charges against Watson's wife that had been dropped and against Watson that had been plea bargained to three years probation, J.A. at 1689-92, and it heard testimony from a state trooper that Watson "wanted a deal," meaning "he didn't want to go to prison," J.A. at 2050. Nonetheless, the Virginia Supreme Court expressly found that "O'Dell was unable to prove a plea agreement existed between Watson and the Commonwealth." *O'Dell*, 364 S.E.2d at 498 n. 4.³³

And, finally, there was all of the blood evidence introduced at trial. The Commonwealth's expert, Ms. Emrich testified at length regarding the great quantities of blood found on O'Dell's clothing and car, all of which was consistent with Schartner's blood and inconsistent

³³ O'Dell claims to have new evidence now substantiating his claim that Watson had cut a deal, but that evidence does little to prove that claim. See discussion *infra* at 1254-1255.

with O'Dell's. See *supra* at 1247. Helen Schartner's combination of blood and enzyme type occurs in .3% (three out of a thousand) of the population; O'Dell's occurs in .08% (eight out of ten thousand). J.A. at 1921. The DNA evidence that O'Dell introduced at the federal *habeas* hearing was in no way inconsistent with that testimony, J.A. at 2815, as even O'Dell's expert was forced to concede, J.A. at 2636, 2878.³⁴ DNA testing is simply more discriminating than electrophoretic testing; the latter limits a blood sample to a range of people (in this case, .3% of the population), whereas the former can limit it to just one individual. J.A. at 2815, 2878.

Plus, a reasonable juror would have been confronted with O'Dell's new DNA evidence. That juror would have seen the LifeCodes Report, the Commonwealth's experts, and O'Dell's expert all agreeing that one of the stains on his shirt was from neither O'Dell nor Schartner. Of course, this evidence would have contradicted O'Dell's "alibi," that the blood on his clothing came from his own

³⁴ Dr. Guerrieri, an expert for the Commonwealth, explained at the state *habeas* hearing yet another way how the DNA exclusion of the shirt could still be consistent with the enzyme match on that same shirt:

One possibility would be that there are two different sources of genetic material in that particular stain; that is to say in the DNA testing, as well as the serology testing, a large portion of the stain is often consumed in the analysis. So if you sample one region - if Miss Emerich [sic] sampled one region in a particular location, and the commercial testing lab sample[d] adjacent to that, it's conceivable they could have been two different blood sources.

J.A. at 2751-52.

nose when he was struck stopping a bar fight.³⁵ And the juror would have reviewed the LifeCodes DNA report conclusively stating that the blood on O'Dell's jacket was Helen Schartner's. To be sure, that juror would also have been confronted with the conflicting testimonies of the Commonwealth's and O'Dell's experts concerning the inferences to be drawn from the data upon which LifeCodes relied, and, because the federal district court found that the blood on the jacket was "inconclusive," we assume that the testimony of O'Dell's expert was at least credible. But nonetheless, a reasonable juror would have been presented with all the evidence: the LifeCodes report (stating conclusively that DNA proved the blood was Schartner's), the Commonwealth's expert's testimony (stating that the data, even unadjusted for band shifting, fell within the Virginia crime lab's and the FBI's criteria for a positive DNA match), and O'Dell's expert (agreeing that band shifting had occurred but arguing that the blood evidence was "inconclusive" because it fell slightly outside LifeCodes' unadjusted match criterion of 1.8%).

And, finally, a reasonable juror could have considered that O'Dell had been previously convicted in Florida

³⁵ Although his brief before this court argues that, during the alleged fight at the Brass Rail, he "became covered with the blood of the two other individuals," Petitioner's Br. at 7, the only support it cites for that proposition is his own federal petition for habeas corpus. That petition, in turn, states simply that "[d]uring the course of this fight, O'Dell's clothes became covered with blood." J.A. at 35. Regardless, the Virginia Supreme Court expressly found "O'Dell told the police the blood came from a nose bleed caused by being struck while attempting to stop a fight at another club," O'Dell, 364 S.E.2d at 495 n. 2 (emphasis added).

of a crime virtually identical to this one, and that he had been paroled, after serving eight years on a 99-year sentence, only fourteen months before Schartner was murdered. There, the victim testified that O'Dell had abducted her, robbed her, *struck her several times on the head with his gun*, and *choked her*, all in an effort to force her to submit to his sexual advances. See O'Dell, 364 S.E.2d at 510; J.A. at 2345-47. This testimony could very well have been admitted at trial as indicative of O'Dell's *modus operandi*, see *Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609, 616-17, *cert. denied*, 498 U.S. 908, 111 S.Ct. 281, 112 L.Ed.2d 235 (1990); cf. Fed.R.Evid. 404(b); Weinstein's Evidence p 404[16] at 404-100 to 404-102, and, regardless of its admissibility, should properly be considered in assessing O'Dell's claim of "actual innocence," *Schlup*, ___ U.S. at ___, 115 S.Ct. at 867.

When viewing all of this evidence – being together at the County Line Lounge, leaving within fifteen minutes of each other, being covered with blood, planning to go suddenly to Florida, having inconsistent alibis, plus the wounds matching his gun, the tracks matching his tires, the hairs, the semen, the spermatozoa, the blood enzymes, the blood DNA on the jacket, the confession, and the nearly identical earlier crime – we do not believe it can even remotely be claimed that O'Dell has established that it is more likely than not that *no* reasonable juror would have convicted him. The only thing that O'Dell has demonstrated is that *one* of the many blood stains on his clothing did not come from either himself or Helen Schartner; that he also had someone else's blood on his shirt by no means shows that he did not murder Helen Schartner, particularly in light of the vast other

evidence that he did. We therefore hold that O'Dell has not passed through the "narrow" gateway of actual innocence, and so are barred from reviewing his procedurally defaulted claims on federal *habeas*.

IV.

O'Dell also challenges the federal district court's decision to grant him a full evidentiary hearing on only the DNA evidence, without allowing him to present other "new" evidence disputing the expert testimony at trial concerning the effect of intermingling bodily fluids, other unspecified circumstantial evidence linking him to the crime, and the testimony of cellmate Stephen Watson that O'Dell had confessed. We conclude that the district court was entirely within its discretion in so limiting the hearing.

O'Dell had the full opportunity to develop these factual bases in state court. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992), the Supreme Court held that a federal *habeas* petitioner

is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure.

The Court also "adopt[ed] the narrow exception to the cause-and-prejudice requirement," holding that

[a] habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing.

Id. at 11-12, 112 S.Ct. at 1721. Except in regards to Watson's testimony, O'Dell makes no claim of cause or prejudice. Instead, he argues that it would be "a fundamental miscarriage of justice" not to hold an evidentiary hearing on these other claims. Petitioner's Br. at 53. For analogous reasons to those explained above, we do not believe O'Dell has come even close to demonstrating a fundamental miscarriage of justice from the district court's decision not to grant him an unrestricted evidentiary hearing.

O'Dell also claims that he has demonstrated cause and prejudice for his failure to develop the factual record in state court concerning Watson's testimony. O'Dell has continually maintained that Watson gave false testimony about O'Dell's confession in exchange for a plea agreement with the authorities, and he now proffers an affidavit of a private investigator who interviewed Watson some five years after the trial and claims to have uncovered some incriminating statements. O'Dell argues that Watson's alleged perjury and the prosecution's failure to correct that perjury (by disclosing that plea agreement as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)), along with the trial court's limitation of his cross examination of Watson, constituted cause for his failing to adequately develop the factual record before the state court.

We disagree. Although the alleged perjury and prosecution cover-up is external to O'Dell, the only "new" evidence he has is the affidavit from his investigator's interview of Watson. O'Dell has proffered no reason why his investigator was not able to interview Watson before

trial. Moreover, the state court allowed O'Dell considerable leeway in cross-examining Watson about any plea bargains or deals, and Watson repeatedly denied any such agreements. J.A. at 1680-81, 1689-96, 2023-24.

And, regardless, O'Dell could not possibly show any prejudice. First, his "new evidence" was of dubious value. The private investigator, who has never had his story subjected to cross-examination, claimed that Watson stated that he really did not know "how the girl was killed" (contradicting his trial testimony that O'Dell said he had strangled her), that O'Dell "could have been just bragging," and that "[t]o [his] knowledge, there was no deals, they didn't go through; . . . [He] did not know of any deals at all. [He's] not saying there wasn't, but [he himself] did not know of any." J.A. at 238-39 (emphasis omitted). None of these statements prove, or even suggest, the presence of a plea bargain, nor do they prove O'Dell's innocence, as the district court expressly found before concluding "the new evidence does not merit a hearing." J.A. at 345.

Second, even if it were of value, the evidence was almost certainly cumulative. The jury heard, at length, that Watson's family had a reputation for untruthfulness, that Watson was a seven-time convicted felon, that Watson and his wife had recently been facing criminal charges, that Watson had wanted "to make a deal" to avoid prison time, and that recent charges against Watson's wife had been dropped and Watson had received only three years probation on multiple breaking and

entering charges. We do not think that O'Dell's investigator's claims would have substantially increased the reasons that the jury had to doubt Watson's credibility and to scrutinize his story carefully.

Given the overwhelming other evidence of guilt detailed above, we are certain that nothing said by this investigator concerning Watson would have given any juror reasonable doubt as to whether O'Dell in fact murdered Helen Schartner on the night of February 5, 1985.

"Federal Courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090 (1983). Here, the Virginia Supreme Court expressly found that,

"[a]t trial, the court permitted O'Dell to fully develop all pretrial contacts and negotiations Watson had with the Commonwealth. O'Dell was unable to prove a plea agreement existed between Watson and the Commonwealth."

O'Dell, 364 S.E.2d at 498 n. 4. Under 28 U.S.C. § 2254(d), this factual finding is entitled to a presumption of correctness, and O'Dell has given us no "convincing evidence that the factual determination by the State court was erroneous."³⁶

³⁶ Because we reject O'Dell's claims on the grounds that we do, we need not consider his claims under the Anti-terrorism and Effective Death Penalty Act of 1996. Under that newly-enacted statute, O'Dell's claims, of course, would have even less merit, given the considerably more demanding standards therein imposed on *habeas* petitioners.

CONCLUSION

The judgment of the district court granting the petitioner's writ of *habeas corpus* is reversed, and the case is remanded with instructions to reinstate the death sentence. Likewise, the portion of the district court opinion finding that petitioner had not procedurally defaulted the claims that he failed to properly appeal from the state *habeas* court is reversed. The remainder of the district court opinion, finding that petitioner has not demonstrated actual innocence, is affirmed under the legal standard of *Schlup*.

REVERSED IN PART AND AFFIRMED IN PART.

ERVIN, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the district court was correct in holding that O'Dell's challenges to his conviction are without merit, and I concur in those portions of the majority opinion affirming the district court's judgment denying O'Dell relief from his conviction.¹

However, I must respectfully dissent from that part of the majority opinion holding that the district court erred in vacating O'Dell's death sentence on the basis of the Supreme Court's recent decision in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). For the reasons that follow, I am persuaded that *Simmons* did not announce a "new rule" under *Teague v.*

¹ Like the majority, I also decline to address the question of the applicability of the Anti-terrorism and Effective Death Penalty Act of 1996 to this case.

Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and that the district court was also right in granting O'Dell relief from his sentence. I would, therefore, affirm the district court's judgment in its entirety, and I must dissent from the majority's failure to uphold that portion of the district court's decision.

I.

A.

In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the Supreme Court reversed a defendant's capital sentence after determining that his constitutional rights had been violated when the trial court refused to allow defense counsel to inform the jury that the defendant was statutorily ineligible for parole. During sentencing deliberations, the parole issue occurred to the jury, which asked the judge: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.* at ___, 114 S.Ct. at 2192. The trial judge responded that parole eligibility "is not a proper issue for your consideration." *Id.*

Before the United States Supreme Court, *Simmons* claimed that the trial court's refusal to inform the jury that he would be ineligible for parole had violated his rights under the Due Process Clause of the United States Constitution.² Seven Justices

² *Simmons* also raised a claim under the Eighth Amendment, the merits of which the Court's plurality opinion declined to address. *Simmons*, 512 U.S. at ___, n. 4, 114 S.Ct. at 2193 n. 4. Justice Souter, in a concurring opinion joined by

agreed.³ Writing for a plurality that included Justices Stevens, Ginsburg, and Breyer, Justice Blackmun stated: "We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at ___, 114 S.Ct. at 2190 (plurality opinion). Justice Blackmun's opinion appears to require that a court inform the jury *sua sponte* that the defendant will remain imprisoned for life, regardless of whether the defendant requests such an instruction.

We read the precise holding of *Simmons*, however, more narrowly. Justice O'Connor based her opinion concurring in the judgment, in which the Chief Justice and Justice Kennedy joined, on the "hallmark of due process" that a defendant is entitled to "meet the State's case against him." *Id.* at ___, 114 S.Ct. at 2200 (O'Connor, J., concurring in the judgment). As Justice O'Connor's opinion encapsulates the "position taken by those Members [of the Court] who concurred in the judgments on the narrowest ground," *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), we use her statement of the *Simmons* "rule" as the benchmark for our analysis below: "Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury - by either argument or

Justice Stevens, expressed a belief that the judgment reached by the court also was compelled by the Eighth Amendment. *Id.* at ___, 114 S.Ct. at 2198-99 (Souter, J., concurring).

³ Justice Scalia wrote a dissent in which Justice Thomas joined. *Id.* at ___, 114 S.Ct. at 2201 (Scalia, J., dissenting).

instruction - that he is parole ineligible." *Id.* at ___, 114 S.Ct. at 2201 (O'Connor, J., concurring).

B.

The Commonwealth concedes that the facts of this case are indistinguishable from those in *Simmons*. As in *Simmons*, the trial court denied the defendant's request for an instruction on parole ineligibility, and, like *Simmons*, O'Dell was prohibited from rebutting the prosecution's argument that he would be dangerous in the future with evidence that he would be incarcerated for the remainder of his life. The Commonwealth attempts to distance itself from *Simmons* by arguing that the case announced a "new rule" of constitutional criminal procedure inapplicable on collateral review to O'Dell's already final conviction under the non retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). Review of the district court's application of *Teague* is conducted *de novo*. See *Spaziano v. Singletary*, 36 F.3d 1028, 1041 (11th Cir.1994), *cert. denied*, ___, U.S. ___, 115 S.Ct. 911, 130 L.Ed.2d 793 (1995).

As a general proposition, " 'a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.' " *Turner v. Williams*, 35 F.3d 872, 879 (4th Cir.1994) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (plurality opinion)), *cert. denied*, ___, U.S. ___, 115 S.Ct. 1359, 131 L.Ed.2d 216 (1995). In *Caspari v. Bohlen*, 510 U.S. 383, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994), the Court set forth the following

three-pronged approach for determining what constitutes a new rule:

First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must "[s]urve[y] the legal landscape as it then existed," and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Id. at 390, 114 S.Ct. at 953 (citations omitted) (quoting *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 898, 122 L.Ed.2d 260 (1993), and *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260, 108 L.Ed.2d 415 (1990)). Proceeding through the *Caspari* analysis, we note first that O'Dell's conviction became final on October 3, 1988. *O'Dell v. Virginia*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988). Our task, then, is to determine whether an objectively reasonable jurist in October 1988 would have felt compelled to conclude that the rule applied in *Simmons* was "required by the Constitution." *Turner v. Williams*, 35 F.3d at 880.⁴

⁴ We have found no authority from other federal appellate courts that addresses squarely the issue before us. In *Stewart v. Lane*, 60 F.3d 296 (7th Cir.1995), the Seventh Circuit held that *Simmons* was unavailable to a habeas petitioner whose convictions had become final on May 20 and May 28, 1985,

The two major cases on which the *Simmons* Court principally relied had been decided in 1977 and 1986. See *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina*, 476 U.S. 1, 106

because the case fell within those "'gradual developments in the law over which reasonable jurists may disagree.'" *Stewart*, 60 F.3d at 302 (quoting *Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828). However, the *Stewart* panel expressly limited its holding to convictions that became final prior to the Supreme Court's decision in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986):

After reviewing the state of the law in May, 1985, we conclude that the rule sought by *Stewart* and recognized by the *Simmons* Court, was not dictated by existing precedent. *Simmons* relies primarily on *Skipper v. South Carolina* and *Gardner v. Florida*. *Stewart* cannot benefit from the rule of *Skipper*, however, because the Supreme Court rendered its decision in that case eleven months after *Stewart*'s convictions became final.

Stewart, 60 F.3d at 300-301 (citations omitted). Given the centrality of *Skipper* to the claim before us, see *infra*, the decision whether *Stewart*'s *Simmons* claim was *Teague*-barred was a closer one. Certainly, it does not dictate a decision in the factually distinct situation before us.

Two other circuits have declined to express an opinion on whether *Simmons* announced a new rule. See *Ingram v. Zant*, 26 F.3d 1047, 1054 n. 5 (11th Cir.1994) (distinguishing the facts before it from those in *Simmons*), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1137, 130 L.Ed.2d 1097 (1995); cf. *Allridge v. Scott*, 41 F.3d 213, 222 n. 11 (5th Cir.1994) (observing that the extension of *Simmons* sought by the petitioner would constitute a new rule under *Teague*), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995).

S.Ct. 1669, 90 L.Ed.2d 1 (1986).⁵ In *Gardner*, the Supreme Court ruled that the Due Process Clause does not permit the execution of a person "on the basis of information which he had no opportunity to deny or explain," in that case a presentence report kept from the defendant. 430 U.S. at 362, 97 S.Ct. at 1206. In *Skipper*, the Court elaborated on the principle it had announced in *Gardner* and held that a defendant's rights under the Eighth and Fourteenth Amendments were violated by the trial court's refusal to admit evidence of the defendant's good behavior in the penalty phase of his capital trial. 476 U.S. at 5 n. 1, 8-9, 106 S.Ct. at 1671 n. 1, 1672-73. According to the *Skipper* Court, "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," elemental due process principles require the admission of the defendant's relevant evidence in rebuttal. *Id.* at 5 n. 1, 106 S.Ct. at 1671 n. 1; see also *id.* at 9, 106 S.Ct. at 1673 (Powell, J., concurring in the judgment) ("[B]ecause petitioner was not allowed to rebut evidence and argument used against him," the defendant was denied due process.).

Each of the defendants in *Gardner*, *Skipper*, and *Simmons* were barred from presenting to the jury evidence of

⁵ The *Simmons* Court also cited *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (noting that due process entitles a defendant to "a meaningful opportunity to present a complete defense"), and *Ake v. Oklahoma*, 470 U.S. 68, 83-87, 105 S.Ct. 1087, 1096-98, 84 L.Ed.2d 53 (1985) (holding that due process entitles an indigent defendant to the assistance of a psychiatrist for the development of his defense). *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2194 (plurality opinion).

critical importance to the fact-finding process. The similarity between the situation that confronted *Skipper* and *Simmons* is especially striking. Surely a Constitution that entitles a defendant to rebut the prosecution's argument of future dangerousness with evidence of his good behavior in prison likewise entitles him to inform the jury that he will remain incarcerated for life. *Cf. id.* at 5 n. 1, 106 S.Ct. at 1671 n. 1. Thus, it would have been an illogical application of *Skipper* "to [have] decide[d] that it did not extend to the facts of" *Simmons*. See *Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990).

In *Turner v. Williams*, we noted the "critical distinction between the *extension* of an existing rule on collateral review and the mere *application* of an existing normative rule . . . to a new set of facts." 35 F.3d at 884. Similarly, we noted in *Correll v. Thompson*, 63 F.3d 1279 (4th Cir.1995), that *Teague* was not an obstacle where "[t]he question presented to us merely requires the application of [prior] decisions to a new set of facts - not an extension of precedent to create a new rule." *Id.* at 1285 n. 5. The normative formulation from which *Simmons* sprang was enunciated in *Gardner* and, even more clearly, in *Skipper*. It need not previously have been applied in a factually identical situation in order to avoid classification as a "new rule." See *Stringer v. Black*, 503 U.S. 222, 227-29, 112 S.Ct. 1130, 1134-36, 117 L.Ed.2d 367 (1992). For "when we apply an extant normative rule to a new set of facts (leaving intact the extant rule) generally we do not announce a new constitutional rule of criminal procedure for purposes of *Teague*." *Id.* at 885; see also *id.* ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the

force with which the precedent's underlying principle applies, the distinction is not meaningful and any deviation from precedent is not reasonable.' ") (quoting *Wright v. West*, 505 U.S. 277, 304, 112 S.Ct. 2482, 2497, 120 L.Ed.2d 225 (1992) (O'Connor, J., concurring in the judgment)).

The *Simmons* plurality reached the conclusion that its decision was "compel[led]" by *Gardner* and *Skipper*, cases handed down years before O'Dell's conviction became final. *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2194 (plurality opinion).⁶ The Supreme Court has recognized, however,

⁶ Nothing in Justice O'Connor's opinion concurring in the judgment contradicts the plurality's conclusion that "it is clear that the State denied petitioner due process." *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2193 (plurality opinion) (emphasis added). The Commonwealth would have me read the plurality and concurring opinions to disagree over the plurality's conclusion that *Simmons* was compelled by existing precedent. I see the divergence differently. Unlike the Justices concurring in the judgment, the plurality would recognize a constitutional violation even where the defendant did not seek to rebut evidence that he would pose a danger in the future. Compare *id.* at ___, 114 S.Ct. at 2190 (plurality opinion) ("due process requires that the sentencing jury be informed that the defendant is parole ineligible") with *id.* at ___, 114 S.Ct. at 2201 (O'Connor, J., concurring in the judgment) ("due process entitles the defendant to inform the capital sentencing jury - by either argument or instruction - that he is parole ineligible"). Because the issue is not before me, I do not address whether the plurality's position would constitute a new rule under *Teague*. Because this case falls within the most narrow reading of *Simmons*, that provided by Justice O'Connor's concurrence, O'Dell neither seeks nor requires the application of a broader mandate.

that a court's indication that a case is "directly controlled" by earlier authority is not dispositive of the new rule issue. See *Butler*, 494 U.S. at 414, 110 S.Ct. at 1217. Although such language is not conclusive, see *id.* at 415, 110 S.Ct. at 1217, it is a factor in assessing whether an objectively reasonable jurist would have predicted a particular decision.

Similarly, that a judgment garners support from a substantial majority of the Court's Justices provides an indication that a decision reasonably was expected. In the case before me, seven Justices accepted *Simmons*' argument that his due process rights had been violated because he was not allowed to present evidence rebutting the state's future dangerousness argument. I also note that a substantial majority of states had rejected the practice disapproved of in *Simmons*. At the time of that decision, "only two states other than South Carolina [had] a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse[d] to inform sentencing juries of this fact." *Simmons*, 512 U.S. at ___ n. 8, 114 S.Ct. at 2196 n. 8.

In arguing that *Simmons* announced a new rule, the Commonwealth and the majority rely heavily on *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). In that case, the Court upheld as consistent with due process a California sentencing provision that permitted the trial court to advise the jury of the Governor's power to commute a life sentence, but not requiring it to inform the jury of his power to commute a death sentence. According to the *Ramos* Court, the instruction "d[id] not violate any of the substantive limitations this

Court's precedents have imposed on the capital sentencing process." *Id.* at 1013, 103 S.Ct. at 3459-60. As Justice Blackmun noted in *Simmons*, however, *Ramos* is not inconsistent with the *Gardner/Skipper* rule applied in *Simmons*.⁷ *Id.* at ___, 114 S.Ct. at 2196. The *Ramos* Court explicitly upheld the California statute because it did "not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." 463 U.S. at 1004, 103 S.Ct. at 3455. Moreover,

⁷ According to Justice Blackmun:

It is true that *Ramos* stands for the broad proposition that we generally will defer to a State's determination as to what a jury should and should not be told about sentencing. . . . States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide "greater protection in [the States'] criminal justice system than the Federal Constitution requires." Concomitantly, nothing in the Constitution prohibits the prosecution from arguing any truthful information relating to parole or other forms of early release.

But if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons, 512 U.S. at ___, 114 S.Ct. at 2196 (plurality opinion) (citation omitted).

Ramos "emphasized that informing the jury of the Governor's power to commute a sentence of life without possibility of parole was merely an accurate statement of a potential sentencing alternative." *Ramos*, 463 at 1009, 103 S.Ct. at 3457. In contrast, the *Simmons* problem occurs where a defendant is prohibited from presenting information necessary to correct a critical misapprehension created by the prosecution,⁸ and *Gardner* and *Skipper* demonstrate that a capital defendant *must* be afforded the opportunity to rebut evidence offered by the prosecution regarding his future dangerousness.⁹

I recognize that some courts, including this one, had interpreted the language in *Ramos* broadly and reached what at first glance appears to be a result contrary to *Simmons*. Most of those decisions, however, actually did not involve a true *Simmons* situation: a capital defendant seeking to rebut the prosecution's contention of future

⁸ In recognizing the analytical distinctions between these lines of authority, it should be remembered that *Ramos* falls chronologically between *Skipper* and *Gardner*. The *Ramos* Court found no need to overrule or limit *Gardner*. Likewise, the *Skipper* Court did not find it necessary to distance itself from *Ramos* to hold that a capital defendant is entitled to rebut evidence of future dangerousness.

⁹ Assessing how a reasonable jurist might have analyzed any perceived conflict between *Ramos* and *Skipper*, it is much easier to distinguish the commutation power at issue in *Ramos* than the evidence of a capital defendant's good behavior at issue in *Skipper*. Compared with parole, commutation is a relatively minor power that is rarely invoked and less central to the question of future dangerousness. Most importantly, the impact of an instruction on the possibility of commutation in a capital jury's sentencing deliberation is unclear.

dangerousness with evidence of his statutory ineligibility for parole. Both *Turner v. Bass*, 753 F.2d 342 (4th Cir.1985), *rev'd on other grounds sub nom. Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and *Peterson v. Murray*, 904 F.2d 882 (4th Cir.1990), on which the Commonwealth relies extensively, involved factually distinct circumstances.¹⁰ As I have construed it above, *Simmons*

¹⁰ In *Turner v. Bass*, we determined that, "while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required." 753 F.2d at 354. However, the facts in *Turner v. Bass* are distinguishable from those in *Simmons* and this case. *Turner* clearly was eligible for parole, as he sought an instruction that "the parole board is permitted to grant parole only after finding that the prisoner's release will serve his interests and the interests of society." *Turner v. Bass*, 753 F.2d at 353. Importantly, *Skipper* – with its clear mandate that a defendant is entitled to rebut the prosecution's claim of future dangerousness – had yet to be decided.

In *Peterson*, the petitioner would have been ineligible for parole only for a period of twenty years. 904 F.2d at 882. Also, the *Peterson* panel rested its holding on the right to present mitigating evidence under the Eighth Amendment doctrine of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), not that entitling a defendant to rebut damaging evidence presented by the prosecution under the Fourteenth Amendment jurisprudence of *Gardner* and *Skipper*. *Peterson*, 904 F.2d at 887 (" '[S]tates are free to structure and shape consideration of mitigating evidence.' ") (quoting *Boyde v. California*, 494 U.S. 370, 377, 110 S.Ct. 1190, 1196, 108 L.Ed.2d 316 (1990)). In fact, the *Peterson* panel failed to distinguish *Gardner* and *Skipper* in any way, presumably because the cases were inapplicable to the claim before it. I note as well that *Peterson* had not been decided at the time O'Dell's conviction became final, and therefore could not have influenced a reasonable jurist in any event. Finally, the *Peterson* panel considered itself bound by our earlier decision in *Turner*, see *infra* note 8, which was decided without benefit of

applies only in this relatively narrow situation. Were the *Simmons* "rule" to be read broadly, it might indeed run afoul of *Ramos* and necessarily be considered "new." As even the Commonwealth recognized at oral argument, however, "[t]hey did not have to overrule *Ramos* to write the *Simmons* opinion."

Moreover, "the mere existence of [prior] conflicting authority does not necessarily mean a rule is new." *Wright*, 505 U.S. at 304, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment). As we discussed extensively

the intervening decision in *Skipper*. *Peterson*, 904 F.2d at 887 ("Our holding in *Turner* controls here.").

The other Court of Appeals case on which the Commonwealth relies, *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir.1983), is similarly distinguishable. There is no indication that the defendant in *O'Bryan* was ineligible for parole. He challenged the trial court's "refusal to instruct the jury about the law governing the Board of Pardons and Paroles in relation to inmates sentenced to life imprisonment," in order to correct the "widely held misconception that a life sentence will result in a defendant's only serving nine or ten years in prison." *Id.* at 388. Again, there is no sign that the petitioner sought to remedy a misimpression created by the prosecution's argument that he would be dangerous in the future. It is, in fact, consistent with *Ramos* that the Fifth Circuit would reject a petitioner's general complaint that a jury might misunderstand the meaning of a life sentence as not being cognizable under the Constitution.

The state law cases on which the Commonwealth relies are similarly distinguishable. See, e.g., *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 369-70 (1992) (defendant eligible for parole after thirty years), *cert. denied*, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, 828 (Va.) (decided prior to *Skipper*, and no indication of parole ineligibility), *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985).

in *Turner v. Williams*, 35 F.3d at 883-84, the Supreme Court held in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), that the petitioner's constitutional claim was not precluded by *Teague*, despite the Fifth Circuit's conclusion that its previous decisions rejecting similar claims barred consideration of *Penry*'s. See *Turner v. Williams*, 35 F.3d at 884. *Penry* "did not seek a new rule because he simply sought the application (not the extension) of a preexisting rule of law in a new factual setting." *Id.*

Similarly, *Simmons* applied the rule announced in *Gardner* and reaffirmed in *Skipper* to a different, but related, factual situation: the particular evidence the defendant sought to introduce to rebut the prosecution's evidence of future dangerousness was his statutory ineligibility for parole. As Justice Blackmun explained, and the Commonwealth conceded by admitting that *Ramos* remained good law after *Simmons*, *Ramos* and its progeny are not inconsistent with *Simmons*. See *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2196 (plurality opinion). At bottom, *Simmons* examines whether a person who is subjected to the death penalty on future dangerousness grounds is entitled to rebut that argument with highly relevant evidence, not the presentation of a parole eligibility scheme to a jury. Cf. *Hunt v. Nuth*, 57 F.3d 1327, 1334 (4th Cir.1995) (citing *Simmons* as standing for the proposition that "the crucial significance of parole ineligibility in a capital sentencing is its relationship to future dangerousness and the ultimate objective of incapacitating the offender from inflicting future harm on society" (emphasis added)). *Ramos*, on the other hand, involved the application of a more general rule concerning a state's

discretion to offer or withhold the details of its commutation and early release systems. Because *Ramos* does not conflict with the more specific principle employed in *Simmons*, see *supra*, the *Simmons* Court could apply *Skipper* and *Gardner* without announcing a new rule of constitutional criminal procedure, at least as to convictions that became final after those cases were decided.

Applying *Teague* "leaves something to be desired, for '[i]t is admittedly often difficult to determine when a case announces a new rule. . . .'" *Turner v. Williams*, 35 F.3d at 879 (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (plurality opinion)). In this case, however, the Commonwealth is forced to argue that *Simmons* announced a new rule because it was not dictated by one line of authority (*Ramos* and its progeny), when another line of more relevant cases compelled its result. Because the legal landscape of 1988 mandated the decision reached by the Supreme Court in *Simmons*, I believe that O'Dell does not seek the application of a "new rule" of constitutional criminal procedure.¹¹

¹¹ Because of my conclusion that O'Dell's *Simmons* claim is not *Teague*-barred, I do not address his argument that *Simmons* fits within the *Teague* exception for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." See *Turner v. Williams*, 35 F.3d at 878 n. 5 (quoting *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed.2d 415 (1990)). However, it seems to me that a strong argument could be made that when a state undertakes to impose a death sentence solely on the ground that a capital defendant poses a further danger, "fundamental fairness and the accuracy of the criminal proceeding" demand that he not be precluded from showing that he was, by virtue of the law of that state, parole ineligible.

C.

Having determined that *Simmons* applies, I turn now to the Commonwealth's argument that any *Simmons* error was harmless. On habeas review, a constitutional violation must have had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 620, 113 S.Ct. 1710, 1712, 123 L.Ed.2d 353 (1993). Contrary to our earlier decision in *Smith v. Dixon*, 14 F.3d 956, 980 (4th Cir.1994) (en banc), cert. denied, ___ U.S. ___, 115 S.Ct. 129, 130 L.Ed.2d 72 (1995), the Supreme Court recently held a petitioner does not carry this burden. *O'Neal v. McAninch*, ___ U.S. ___, 115 S.Ct. 992, 994, 130 L.Ed.2d 947 (1995). Moreover, the Court explained that in a close case, where "the conscientious judge [is] in grave doubt about the likely effect of an error on the jury's verdict," the habeas petitioner "must win." *Id.*

The Commonwealth makes three specific arguments as to why the *Simmons* error suffered by O'Dell was harmless. First, it contends that the district court failed to find that O'Dell was ineligible for parole. The Virginia Supreme Court found that O'Dell had been convicted of three felonies within the meaning of Virginia Code § 53.1-151(B1), making him ineligible for parole under state law. The fact that the federal district court failed to make a specific finding to that effect is immaterial. Furthermore, in light of the Commonwealth's concession that O'Dell's situation falls within *Simmons*, this argument is trivial.

Second, the Commonwealth argues that O'Dell actually informed the jury that he would remain imprisoned

for the remainder of his life. As support for this proposition, it cites a rambling answer by O'Dell to a question about his age:

I am forty-five – will be 45 on September 20. It's just like having a life sentence to go back to prison. I got sixteen years. I do fifteen on a life sentence. Okay. If I went back to prison without this conviction, I am doing a life sentence. I am doing a life sentence. I am never going to get out. It don't make no difference. I am never going to get out.

Joint Appendix at 2433. *Simmons* does hold that a jury's information about parole eligibility need not come by way of a court's instruction; it can come from defense counsel instead. See *Simmons*, 512 U.S. at ___ - ___, 114 S.Ct. at 2200-01 (O'Connor, J., concurring in the judgment). More, however, is required for effective conveyance of the material than was allowed O'Dell in this case. The trial judge found as much when he denied the Commonwealth's motion to strike O'Dell's testimony on the grounds that it informed the jury about his parole ineligibility. *Joint Appendix* at 2433. O'Dell's remarks did not effectively convey the evidence most critical to rebutting future dangerousness – that he was ineligible for parole under state law.

The Commonwealth's third argument rests on its assertion that O'Dell's jury sentenced him to death on the basis of two aggravating factors, vileness as well as future dangerousness. Under *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), where one valid aggravating factor is sufficient to support a death sentence, that sentence need not be set aside simply because

the jury also found an invalid aggravating factor. *Id.* at 884, 103 S.Ct. at 2746; accord *Smith v. Procunier*, 769 F.2d 170, 173 (4th Cir.1985), *aff'd sub nom. Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). While the trial transcript indicates a finding by the jury that O'Dell's crime was "outrageously wanton, vile or inhuman," see *Joint Appendix* at 2506, the Virginia Supreme Court determined that "the jury did not base its verdict on the vileness predicate." *O'Dell*, 364 S.E.2d at 507; see also *Joint Appendix* at 337. On that basis, the state court declined to consider O'Dell's argument that the trial court's instruction on the vileness predicate was improper, affirming his death sentence on the basis of the finding of "future dangerousness" alone. *O'Dell*, 364 S.E.2d at 510. Rejecting the Virginia court's finding at this time would effectively deprive O'Dell of his right to direct appeal. Moreover, as the Commonwealth admitted at oral argument, "[it] didn't move to correct" the allegedly erroneous finding, presumably because any error worked to its benefit. Recalling that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991), I accept the finding that O'Dell was convicted based on the future dangerousness factor only. Given the centrality of parole ineligibility to that issue, the Commonwealth has not met its burden to prove that the *Simmons* violation suffered by O'Dell had no "substantial and injurious effect or influence in determining the jury's

verdict." *O'Neal*, ___ U.S. at ___, 115 S.Ct. at 994. Therefore, the decision of the district court to vacate the sentence of death imposed on O'Dell was legally correct and should be affirmed.

II.

For these reasons, I am convinced that the district court's decision was correct and should be affirmed in its entirety. To the extent that the majority opinion fails to do this, I am compelled to dissent therefrom.

I am authorized to state that Judges HALL, MURNAGHAN, HAMILTON, MICHAEL and MOTZ join in this concurring and dissenting opinion.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 8, 1996

No. 94-4013
CA-92-480-R

JOSEPH ROGER O'DELL, III
Petitioner - Appellee

v.

J. D. NETHERLAND, Warden, Mecklenburg
Correctional Center; RONALD J. ANGELONE,
Director, Virginia Department of Corrections;
JAMES S. GILMORE, III, Attorney General
of the Commonwealth of Virginia;
COMMONWEALTH OF VIRGINIA

Respondents - Appellants

No. 94-4014
CA-92-480-R

JOSEPH ROGER O'DELL, III
Petitioner - Appellant

v.

J. D. NETHERLAND, Warden, Mecklenburg
Correctional Center; RONALD J. ANGELONE,
Director, Virginia Department of Corrections;
JAMES S. GILMORE, III, Attorney General
of the Commonwealth of Virginia;
COMMONWEALTH OF VIRGINIA

Respondents - Appellees

ORDER

Appellee/cross-appellant has filed a motion to stay the mandate, appellants filed a response in opposition and appellee filed a reply in support.

The Court grants the motion and stays issuance of the mandate for thirty days pursuant to Federal Rule of Appellate Procedure 41(b). The mandate will be stayed until November 7, 1996.

Judges Widener, Hall, Murnaghan, Ervin, Hamilton, Michael and Motz voted to grant the stay for thirty days and Chief Judge Wilkinson and Judges Russell, Wilkins, Niemeyer, Luttig and Williams voted to deny the motion.

Entered at the direction of Judge Luttig for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA,

v.

Case No. 11,413

JOSEPH ROGER O'DELL,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals has denied federal habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Joseph Roger O'Dell be carried out on the 18th day of December, 1996, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before December 3, 1996, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

Robert S. Smith, Esquire

Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019-6064

The Honorable Robert Humphreys
Commonwealth's Attorney
City of Virginia Beach
Municipal Center
Virginia Beach, Virginia 23456-9050

Eugene Murphy
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 24 day of Oct., 1996.

/s/ Illegible
Judge

I ask for this:

Pursuant to telephone conference
(10-24-96) With Albert D. Alberi, Deputy

Robert Humphreys
Commonwealth's Attorney

Seen and objected to:

Pursuant to telephone conference
(10-24-96) with Robert S. Smith, Esquire

Counsel for Defendant

SUPREME COURT OF THE UNITED STATES

 No. 96-6867(A-424)

 JOSEPH ROGER O'DELL, PETITIONER *v.*
 J. D. NETHERLAND, WARDEN, ET AL.

 ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT
 OF APPEALS FOR THE FOURTH CIRCUIT

(December 19, 1996)

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.

The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, January 30, 1997. Briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 27, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 12, 1997. Rule 29.2 does not apply.

JUSTICE SCALIA, statement respecting the grant of certiorari.

My vote was to deny the petition for certiorari in this case (and hence to deny the application for stay of execution), but I think it important to point out that the issue on which certiorari has been granted, and for which stay has been accorded, has nothing to do with O'Dell's claimed innocence of his crime. The Court has expressly

limited its grant of review to Questions 1 and 2 of the petition for certiorari, which present the legal issue of whether our decision in *Simmons v. South Carolina*, 512 U. S. 154 (1994) – holding that a capital sentencing jury must in certain circumstances be instructed on the possibility of life imprisonment without parole as an alternative to a death sentence – has retroactive application to persons tried before *Simmons* was decided.

We have not granted certiorari on Question 3, the actual-innocence claim based upon newly available DNA evidence. That claim has been rejected by every one of the 13 Court of Appeals judges who have heard this case, as well as by the District Court that originally considered the claim. *O'Dell v. Netherland*, 95 F. 3d 1214, 1246-1254 (CA4 1996) (en banc); *id.*, at 1255-1256 (ERVIN, J., concurring in part and dissenting in part); *id.*, at 1218 (describing District Court decision). The unanimity of these 14 federal judges is unsurprising when the full story of the DNA evidence is told. While the DNA tests showed that blood stains on O'Dell's shirt did not come from the murder victim, Helen Schartner, they also showed that blood stains on his jacket *did* come from the victim – a conclusion consistent with the overwhelming evidence at trial that blood stains on numerous pieces of O'Dell's clothing came from her. *Id.*, at 1247-1248. Not one of the judges reviewing this evidence has been persuaded of O'Dell's innocence.
